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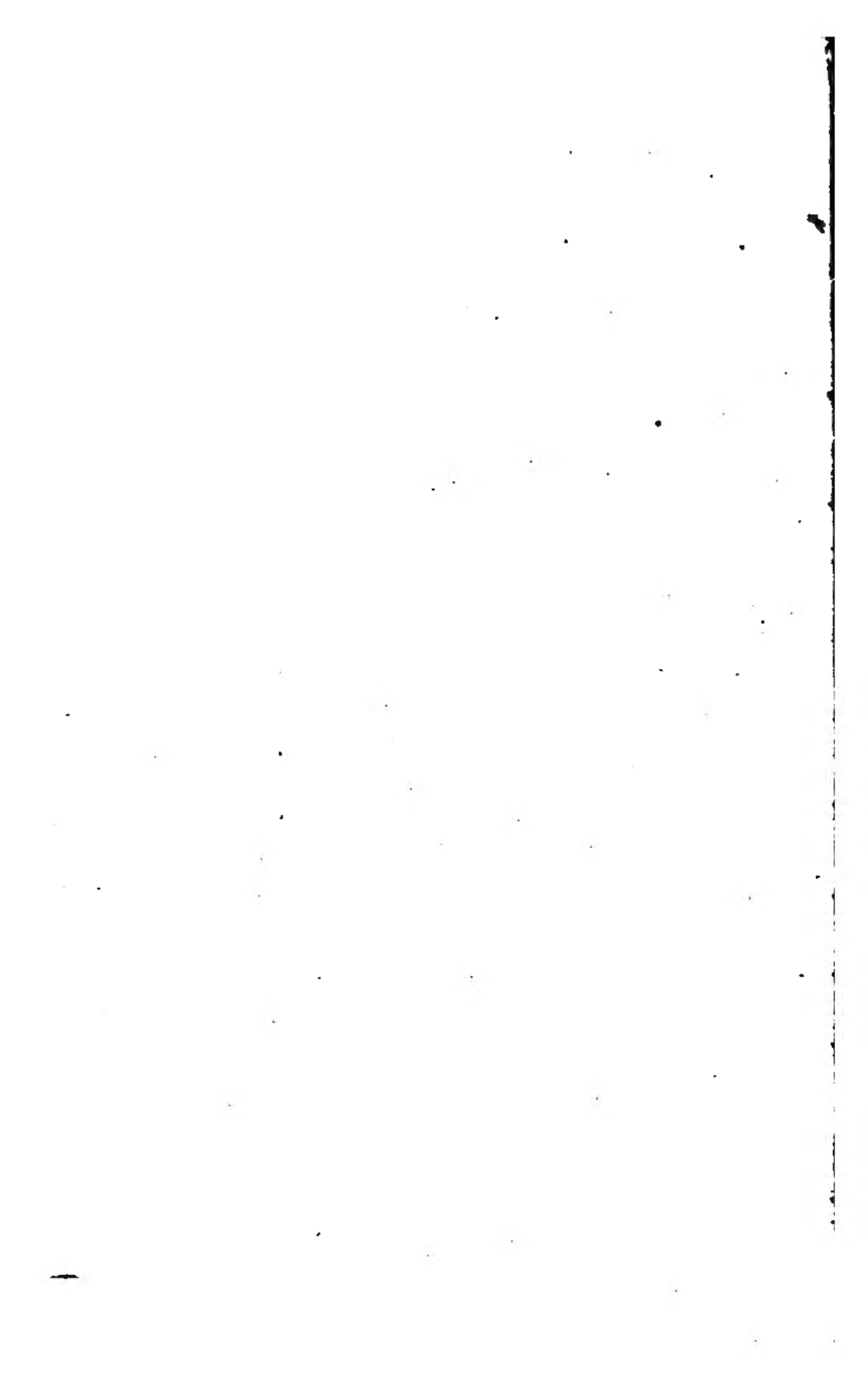
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THE
PRACTICE
IN
CIVIL ACTIONS AND PROCEEDINGS AT LAW,
IN, MASSACHUSETTS. .

BY SAMUEL HOWE,
LATE JUDGE OF THE COURT OF COMMON PLEAS.

EDITED BY
RICHARD S. FAY AND JONATHAN CHAPMAN.
COUNSELLORS AT LAW.

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1834.

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P R E F A C E .

THE basis of the following work upon Practice, consists of a series of lectures, which were prepared by the late lamented Judge Howe, and delivered to the students composing his law school at Northampton. It was his intention, when they should have been completed, to have published them; but before the outlines of his proposed work were entirely filled up, death arrested the progress of his labors. Those who enjoyed the benefit of his instructions, may well regret, that he could not have been spared to have completed his career of usefulness; and to any who knew him, it need scarcely be said, that by his decease, the students of the law were deprived of a most eminently gifted teacher, — the profession of a distinguished member, — the bench of a bright ornament, and society of a most pure and excellent man.

After the death of Judge Howe, his lectures having been circulated in manuscript, and their usefulness appreciated, the late Professor John H. Ashmun, who had been associated with Judge Howe, in the law school, for which the lectures were originally composed, undertook, in conjunction with us, to prepare them for the press. How entirely competent to the undertaking, Professor Ashmun was, his early distinction in the profession abundantly testifies. The illness, however, under which he suffered, prevented him from preparing much of the new

matter,—and his death, which occurred before the publication was commenced, deprived us of the advantage of a revision by him, of a considerable part of our own labors.

This double loss of two distinguished ornaments of the profession, who had been connected with the present work, left its completion to us. None can regret more sincerely than ourselves, that it had not fallen into abler hands. But having entered upon the work, we have ventured to persevere, though the supports upon which we leaned, have been removed. We have been actuated by the desire of making the treatise, in some remote degree, approach to that excellence, which it most certainly would have attained, had either Judge Howe, or Professor Ashmun, been spared to complete it. We offer it, therefore, to the profession, claiming in its behalf, that indulgence, to which its many disadvantages entitle it.

F. & C.

BOSTON, APRIL, 1834.

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ERRATA.

Page 16, note 3, after "page," insert 19.

" 47, 4th line from top, for "1801," read 1810.

" 81, 6th line from top, for "Recognizance bond," read *Recognizance or bond*.

" 301, 7th line from bottom, for "Jones v. Foster," read *Foster v. Jones*.

" 314, note 1, 2d line, for "Stat. 1817. ch. 185. Limiting," read *Stat. 1817. ch. 185, limiting*.

" 349, at the end of Sect. I. insert,

Time of filing set-off. In the *Court of Common Pleas*, demands in *set-off*, must be filed *seven days* before the sitting of the court, where the action is brought: and before a *justice*, or in a *justice's court*, *four days* before the day of trial. [Stat. 1784. ch. 28. s. 13. Stat. 1793. ch. 75. s. 4.]

Mode of filing set-off. Within the prescribed time, the defendant or his attorney, delivers to the clerk, or justice, the account to be filed, who minutes upon it, the day he received it, and afterwards, when the action is entered upon the docket, he minutes thereon, the fact of a *set-off*, having been filed. In the *Court of Common Pleas*, in the county of *Suffolk*, a fee of *twenty cents*, is charged by the clerk, on receiving a demand in *set-off*.

Page 371. The rule there stated, that in actions *ex contractu*, the plaintiff cannot amend by striking out a defendant, has been recently overruled, in the case of *Brewster v. Hobart et al.* tried at Nov. T. 1833, in S. J. C. in *Suffolk*, in which C. J. Shaw allowed the plaintiff to discontinue against one of the defendants, simply upon payment of costs to him.

B O O K I.

PRACTICE.

CHAPTER I.

PRACTICE IN GENERAL.

THE practice of courts, by which the proceedings in actions are governed, is founded on ancient and immemorial usage, regulated from time to time by *rules and orders, judicial decisions, and legislative enactments*.

The practice is the law of the court, and as such is the law of the land.¹

The *rules and orders* of court are either such as are made for the regulation of its general practice, or such as apply only to proceedings in particular cases. The former are agreed upon or adopted by the whole court; the latter depend upon the individual discretion of the judge, who may preside in any particular case. The former are unalterable, except by the power that made them; the latter may be enlarged, revoked or altered in any manner that the circumstances and nature of the case may require.²

The *rules* regulating the admission of attornies, the entry of actions, the filing of pleas in abatement, the taking and opening of depositions, and the like,

¹ Tidd's Pract. Introd. p. 11. Per Aston, J. *Rex v. Wilkes*, 4 Burr. Rep. 2572.

² Vide *Thompson et al. v. Hatch and Trs.* 3 Pick. Rep. 512, 516.

which are to be found in the code published by the court, constitute the former class.

Rules of the second class, which with us are more frequently, and perhaps more properly termed *orders*, are those particular decrees, which are made from time to time, in the progress of a cause, for the purpose of bringing it to a rightful termination. They are often passed in relation to the application of the general rules of court, although they more frequently refer to subjects independent of them.

Besides these two classes, there is an intermediate one, general in its application, like the former, but unwritten, and in some measure discretionary like the latter. They depend upon common usage, and may be called the Common Law of the courts.

The practice of the courts in Westminster is generally considered as furnishing the outline of practice, in all those courts in which the Common Law is administered.¹ In many respects, however, our practice differs widely from theirs.

The powers of the several courts to make and enforce these several *rules* and *orders*, is derived partly from statutes, and is partly inherent in their very nature.

The statute creating the Supreme Court, authorizes them to punish at discretion, all contempts committed against the authority of the same.² *Contempt* is a technical word, and is by no means confined to *indignities* put upon the court, but includes any kind of disobedience or disregard to its reasonable orders, or any omission of duty on the part of its officers.

There is no statute conferring such a power as this

¹ *Fowler et al. v. Miller*, 3 Dallas' Rep. 411.

² Stat. 1782, ch. 9. s. 2.

upon any other court in the Commonwealth, but the Court of Common Pleas in common with this Court, possesses power to establish such rules and regulations as may be necessary to the orderly conducting of the business of the court.¹

The right to punish for disobedience to such rules is necessarily incident to the power to establish them, and, as a general rule, all courts of record possess an inherent right to punish by fine and imprisonment any thing which is *strictly* a contempt of such court.²

The *rules and orders* of court thus established, and thus obligatory when established, together with *legislative enactments* and *judicial decisions* in the cases where they have been thought necessary, are the sources of the practice in the courts of this Commonwealth.

Our practice, compared with that in the English Courts, is exceedingly simple; and as the Court of Common Pleas has jurisdiction throughout the Commonwealth, and the appellate and correcting power of the Supreme Court extends over all the courts, the practice in the several courts is, with but trifling exceptions, uniform throughout the Commonwealth.

The present treatise upon practice is for convenience divided into two books. In the first book are considered in their order, the several steps which *must* be taken in every suit, which proceeds regularly from the issuing of the writ, through a trial, to judgment and execution, in the same court where it originated.

The second book treats of those incidental steps which are not indispensable to the regular completion of any suit, but which *may* be taken in every one ac-

¹ Stat. 1820, ch. 79. §. 7.

² Vid. Stat. 1784, ch. 28. s. 6.

according to circumstances, including the methods of carrying actions from an inferior to a superior Court.

This division has been adhered to as strictly as was practicable. And it was deemed useful, before entering upon the main subject, briefly to state the jurisdiction of the Courts of the United States and of Massachusetts.

CHAPTER II.

JURISDICTION OF COURTS OF THE UNITED STATES.

SECT. I. SUPREME COURT OF THE UNITED STATES.

By the constitution of the United States, “the judicial power of the United States is vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.”¹

1. *Original.* The Judicial power of the United States extends to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.”²

“In all cases affecting ambassadors, other public

¹ Art 3. s. 1.

² Art. 3. s. 2.

ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.”¹

By an amendment to the constitution, “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”²

The Supreme Court consists of a Chief Justice and six associate Justices, any four of whom make a quorum.³

The Supreme Court has *exclusive* jurisdiction of all suits and proceedings *against* ambassadors, other public ministers and consuls; and original, but not exclusive jurisdiction of all suits brought *by* them.⁴

The Courts of the United States have not jurisdiction, when both parties are aliens.⁵ Nor of suits between citizens of different States, except where one of the parties is a citizen of the State where the suit is brought.⁶

2. Appellate. An appeal lies to the Supreme Court of the United States, from any final judgment or decree in the Circuit Court or District Court, where the matter in dispute exceeds the sum of *two thousand*

¹ Art. 3, s. 2.

² Art. in addition, 11.

³ Stat. U. S. 1807, ch. 71, s. 5.

⁴ Stat. U. S. 1789, ch. 20, s. 13.

⁵ *Montalet v. Murray*, 4 Cranch, Rep. 46; *Hodgson et. al. v. Bowerbank, et als.* 5 Cranch Rep. 303.

⁶ *White v. Fenner*, 1 Mason, Rep. 520.

dollars; but no new evidence is received, and the judgment is only reversed or affirmed, except in cases of admiralty and maritime jurisdiction.¹

It is provided by statute, “that a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws, of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission,—may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.” “But no error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, but such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute.”²

The Supreme Court has power to issue writs of *mandamus*, *quo warranto*, and generally to exercise that superintending authority over all inferior courts, which

¹ Stat. U. S. 1789. ch. 20. s. 22; Ib. 1803. ch. 93. s. 2; Ib. 1819. ch. 143.

² Stat. U. S. 1789. ch. 20. s. 25.

almost necessarily belongs to the Court of *dernier resort* in any government. In common with the other Courts of the United States, it has power to issue writs of *habeas corpus*, *scire facias*, and other writs necessary for the exercise of its jurisdiction, and to relieve from imprisonment by *habeas corpus*, persons unjustly detained under color of the authority of the United States.¹

Whenever there is a difference of opinion in the Circuit Court between the judges, the point upon which the disagreement happens shall, during the same term, upon the request of either party, be stated under the direction of the judges, and certified to the Supreme Court at their next session thereafter, and shall be finally decided by the Supreme Court.²

SECT. II. CIRCUIT COURTS OF THE UNITED STATES.

There are *seven* circuits in the United States, corresponding to the number of judges in the Supreme Court. These circuits are subdivided into *districts*. In each district, two circuit courts are holden annually, by one of the judges of the Supreme Court, and the district judge of the district. This court may also be holden by two judges of the Supreme Court, or in case of the absence or disability of the district judge, by one judge only of the Supreme Court.³

These circuits do not, however, include all the States. Several of those more recently admitted into the union are not annexed to any circuit, but in these, the judges of the district courts residing within them, perform the duties of circuit judges.

¹ Stat. U. S. 1789. ch. 20. §. 13, 14.

² Stat. U. S. 1802. ch. 31. s. 6.

³ Stat. U. S. 1802. ch. 31. s. 4; Stat. U. S. 1807. ch. 71.

1. *Original.* It is provided by statute, “that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred dollars*, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state where the suit is brought, and a citizen of another state.” But no Circuit Court “shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange.”¹

This power has been enlarged by a subsequent statute, by which the Circuit Court, concurrently with the District Court of the United States, and the courts and magistrates of the several states, is vested with jurisdiction of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to *one hundred dollars*.²

All crimes and offences cognizable under the authority of the United States, belong to the jurisdiction of the Circuit Courts,—those above the degree of ordinary misdemeanors, exclusively,—others concurrently with the District Courts.³

¹ Stat. U. S. 1789. ch. 20. s. 11.

² Stat. U. S. 1815. ch. 253. s. 4.

³ Stat. U. S. 1789. ch. 20. s. 11 & 9.

The Circuit Court has original jurisdiction of suits for forfeitures relating to copyrights, patents, &c.¹

This court, concurrently with the District Courts, has cognizance of forfeitures incurred under the acts prohibiting the slave trade;² of penalties under the act regulating the number of passengers to be carried in passenger ships;³ and of suits on assigned debentures;⁴ and concurrently with the state courts, of all actions in which the United States Bank are plaintiffs or defendants.⁵

2. *Appellate.* The Circuit Court has appellate jurisdiction from all final decrees and judgments in the District Court, where the matter in dispute, exclusive of costs, exceeds the sum of *fifty dollars*.⁶

When the judge of any District Court is disabled from interest, or any other cause to try a case pending in that court, it may be removed for trial to the Circuit Court.⁷

Any suit commenced in a state court, of which the Circuit Court has concurrent jurisdiction, may be removed from such state court to the Circuit Court by the defendant, upon motion to be made at the time of entering his appearance, and upon his giving security for entering the action &c, according to the provisions of the statute.⁸

¹ Stat. U. S. 1800. ch. 25. s. 3. Ib. 1819. ch. 143.

² Stat. U. S. 1794. ch. 11. s. 1. Ib. 1800. ch. 51. s. 5. Ib. 1803. ch. 63. Ib. 1807. ch. 77.

³ Stat. U. S. 1819. ch. 170. s. 1.

⁴ Stat. U. S. 1799. ch. 128. s. 80.

⁵ Stat. U. S. 1816. ch. 44. s. 7.

⁶ Stat. U. S. 1789. ch. 20. s. 22. Ib. 1803. ch. 93. s. 2. Ib. 1815. ch. 253. s. 2.

⁷ Stat. U. S. 1792. ch. 36. s. 11. Ib. 1809. ch. 94. s. 1. Ib. 1821. ch. 189.

⁸ Stat. U. S. 1789. ch. 20. s. 12. Ib. 1815. ch. 184. s. 8. Ib. 1815, ch. 246. s. 6. Ib. 1817. ch. 283. s. 2.

This motion must be in writing; and ought to shew good cause for the removal, or the motion will be overruled. If allowed, this allowance will not be binding upon the Circuit Court, but the action will be retained or dismissed, according to the facts in the case, without reference to the courts below.¹

In all actions commenced in the Circuit Court, the citizenship of the parties, or the alienage of one of them, or any other circumstance necessary to give it jurisdiction, must be set forth by positive averment, and if there is not a sufficient allegation upon the record for that purpose, the suit will not be sustained. This is upon the ground of its being a court of limited and special jurisdiction.²

If in a suit by a citizen of one state against a citizen of another, the defendant wishes to remove the cause into the Circuit Court, his petition must allege that he is a *citizen* of the other state. It is not sufficient to say that he is resident there.³

In a case of an appeal claimed under the act of 1789, before referred to, where the construction of a statute of the United States was drawn in question, the Supreme Court held that to sustain the appeal, it was not sufficient that the construction of the statute was drawn in question, and that the decision was against the party, but that his title must depend upon the statute.⁴

¹ Stat. U. S. 1789. ch. 20. s. 25. 1 Dunlap's Pract. 230. *Redmond v. Russell*. 12 Johns. Rep. 153.

² *Bingham v. Cabot, et al.* 3 Dallas' Rep. 19, 382. *Turner v. Enrille*, 4 Dallas' Rep. 7. *Turner v. Bank of North America*, 4 Dallas' Rep. 8. *Montalet v. Murray*, 4 Cranch. Rep. 46. *Hodgson et al. v. Bowerbank et als.* 5 Cranch. Rep. 303. *Sullivan v. The Fulton Steam Boat Company*, 6 Wheat. Rep. 450.

³ *Corp v. Vermilye*, 3 Johns. Rep. 145.

⁴ *Williams v. Norris*, 12 Wheat. Rep. 117.

SECT. III. DISTRICT COURTS OF THE UNITED STATES.

The number of District Courts in the United States is thirty-one, seven of the larger states having two and the other states one each. These courts are holden by a single judge, who holds annually four stated terms; they have exclusive jurisdiction of all minor offences against the United States, committed within their respective districts, and upon the high seas, which are punishable by fine not exceeding one hundred dollars, or six months imprisonment.¹

District Courts also have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imposts, navigation or trade, of the United States, where the seizures are made on waters navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.²

District Courts, also, have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. They also have cognizance concurrent with the courts of the several states, or the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States; and of all suits at common law, where the United

¹ Stat. U. S. 1789. ch. 20. s. 9.

² Stat. U. S. 1789. ch. 20. s. 9.

States sue and the matter in dispute amounts, exclusive of costs, to the sum of *one hundred dollars*.¹

They also have jurisdiction exclusively of the courts of the several states of all suits against consuls or vice consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the District Courts in all causes, except civil causes of admiralty and maritime jurisdiction shall be by jury.²

The subjects of which these courts have cognizance concurrently with the Circuit Courts have been stated under the head of Circuit Courts.

District Courts, concurrently with the state courts, have jurisdiction in suits for penalties and forfeitures, under laws passed for the collection of direct taxes and internal duties.³

Almost the whole civil business of the District Courts consists of suits in admiralty, which must be commenced in those courts, and of suits at common law in favor of the United States or their officers, or for penalties and seizures under their laws, and of proceedings for the repeal of patents, few occasions occurring which call for the exercise of their jurisdiction in relation to aliens and consuls. And these courts have proved to be in practice, what they were no doubt designed to be, the admiralty and exchequer courts of the nation.⁴

¹ Stat. U. S. 1789. ch. 20. s. 9. But now by Stat. U. S. 1815. ch. 253. s. 4. in all cases though the amount be *less than* \$100.

² Stat. U. S. 1789. ch. 20. s. 9.

³ Stat. U. S. 1815. ch. 253.

⁴ 1 Paine and D. Pract. 249.

CHAPTER III.

JURISDICTION OF COURTS IN MASSACHUSETTS.

SECT. I. SUPREME JUDICIAL COURT.

The jurisdiction of the several courts in this Commonwealth depends upon the several statutes by which they were erected.¹

The highest court known in our law, is the Supreme Judicial Court, which consists of a Chief Justice, and three associate Justices, who hold their offices during good behavior.²

It was formerly requisite that the court should be holden in all instances by a majority of its members. But by the statutes of 1804. *ch.* 105; 1817. *ch.* 63; 1820. *ch.* 14; 1828, *ch.* 2; and 1832. *ch.* 130, power is given to one justice, to hold the court for all purposes, except for the trial of capital offences, and deciding questions and issues of law. By the statutes aforesaid, it is also provided, that all questions of law, arising before one judge may be reserved for the decision of the whole court. This may be done by a bill of exceptions, duly prepared and tendered to the judge, or it may be, and most usually is, by a report of the case by the judge.

Original and exclusive jurisdiction. The Supreme Judicial Court has not original jurisdiction of any causes, civil or criminal, which are made originally

¹ *Mountfort v. Hall*, 1 Mass. Rep. 443. *Commonwealth v. Johnson*, 8 Mass. Rep. 87.

² Stat. 1823. *ch.* 98.

cognizable by any other court, unless such jurisdiction has been given expressly, or by inevitable implication.¹

This court has by statute, original and exclusive jurisdiction in all cases of divorce and alimony, and the mode of proceeding in them is regulated by the practice of the civil law.²

In addition to the general power given to this court, in relation to alimony and divorce, it is empowered by *Stat.* 1787. *ch.* 32. to enable *femes covert* whose husbands have abandoned them, without making any sufficient provision for them, to contract in their own name and to sell and convey, and sue for any property, real or personal, belonging to them in their own right, and any contracts they may make by virtue of this authority will bind the husband in case of his return in the same way, as contracts made before coverture.

And by *Stat.* 1833. *ch.* 127. when any married man has absented himself from the Commonwealth and abandoned his wife, without sufficient provision for her support, the Supreme Judicial Court, upon application of such wife, may authorize any person, holding money or other personal estate to which her husband is entitled in her right, to pay or deliver the same or any part thereof, to such wife, and to authorize her to release or discharge the same, and such release or discharge shall be as valid as if made by the husband.

By *Stat.* 1817. *ch.* 190. *s.* 6. this court is also made the Supreme Court of Probate; and original and exclusive jurisdiction is given to it, in all cases, where a

¹ *Commonwealth v. Johnson*, 8 Mass. Rep. 87.

² *Stat.* 1785. *ch.* 69. *s.* 7. *Stat.* 1805. *ch.* 57. *Stat.* 1810. *ch.* 119. *Stat.* 1820. *ch.* 56. *Stat.* 1823. *ch.* 73. *Stat.* 1824. *ch.* 138. *Stat.* 1828. *ch.* 55.

judge of probate is a party.¹ The mode of proceeding in such cases is conformable to the practice prevailing in the Court of Probate, but the rules of evidence are the same as in common law proceedings, except when altered by statute.²

The original and exclusive *equity* powers of this court will be stated under the general head of its *chancery* jurisdiction.³

The only original and exclusive *criminal* jurisdiction, now possessed by the Supreme Judicial Court, is that of capital cases in the county of Suffolk.⁴ In the other counties it has the exclusive right of *trying* capital cases, but they must originally be prosecuted in the Court of Common Pleas, and then removed for trial to the Supreme Judicial Court.⁵

This court, or any one judge thereof in term time, or any one or more of the justices thereof, in vacation, has the exclusive right to issue writs of *habeas corpus*.⁶

By *Stat.* 1833. *ch.* 171. a trustee writ may be issued from the Supreme Judicial Court in all cases, where an original writ would lie to that court, and, in such case, the writ may be issued under the seal and signed by the clerk of the Supreme Judicial Court.

Original and concurrent jurisdiction.—In civil *actions at law*, the Supreme Judicial Court has no original jurisdiction concurrently with any other court,—its

¹ *Stat.* 1786. *ch.* 55.

² *Eveleth v. Crouch* and ux. 15 Mass. Rep. 307.

³ *Supra.* page.

⁴ *Stat.* 1812. *ch.* 133.

⁵ *Stat.* 1832. *ch.* 130. s. 1.

⁶ *Stat.* 1784. *ch.* 72. *Stat.* 1808. *ch.* 80. But see *Stat.* 1814. *ch.* 136. s. 3. that C. C. Pleas may also issue *habeas corpus*, where a minor enlists in the U. S. Army.

jurisdiction in these cases being either exclusive, or merely appellate.

The original *equity powers* which it has, concurrently with any other court, will be stated under the head of its *chancery* jurisdiction.¹

In the county of Suffolk, the *criminal* jurisdiction of the Supreme Judicial Court is concurrent with that of the Municipal Court, except in capital cases, where, as we have seen, its jurisdiction is original and exclusive.² In all other parts of the Commonwealth, its criminal jurisdiction is in no case concurrent or original, but merely appellate, except in capital cases, which this court alone can *try*, though they must be originally prosecuted in the Court of Common Pleas.³

The Supreme Judicial Court, in common with the Court of Common Pleas, and also with two justices of the quorum, has power to let persons to bail at their discretion.⁴

The Supreme Judicial Court, concurrently with the Court of Common Pleas, and the Probate Court⁵ has power to grant leave to executors, administrators and guardians, to sell real estate for the payment of debts, and charges of administration where it will be for the benefit of all concerned⁶;—and concurrently with the Court of Common Pleas, to grant license to executors and administrators to convey real estate in pursuance of a contract made by the deceased, upon application of the person, with whom the contract was made, and

¹ Supra. page. 19.

² Stat. 1812. ch. 133.

³ Stat. 1832. ch. 130.

⁴ Stat. 1812. ch. 30.

⁵ Stat. 1817. ch. 190. s. 10. Stat. 1830. ch. 45.

⁶ Stat. 1783. ch. 32, 38. Stat. 1806. ch. 102. Stat. 1818. ch. 112. Stat. 1817. ch. 182. and vid. Stat. 1828. ch. 121.

the performance of the contract on his part, or a readiness to perform.¹

Appellate jurisdiction. By *Stat. 1782. ch. 9. s. 1.* the Supreme Judicial Court has general jurisdiction in all actions real, personal, and mixed, legally brought before them, by appeal, review, writ of error, or otherwise.

In all *actions at law*, real or personal, an appeal lies from the Court of Common Pleas to the Supreme Judicial Court where any issue has been joined, and in which the debt or damage demanded exceeds the sum of *one hundred dollars*.²

In *equity*, an appeal lies to the Supreme Judicial Court from the Court of Common Pleas, in the cases in which chancery powers have been given to the latter court.³

In *criminal* cases, in the county of Suffolk, an appeal lies from the Municipal Court to the Supreme Judicial Court, in all cases in which the former court has original jurisdiction, that is, in all cases except capital ones.⁴ In all the other counties, an appeal lies to the Supreme Judicial Court from the Court of Common Pleas, in all cases which this latter court has power to try—that is all but capital ones,—where the offence is punishable by confinement to hard labor for a term exceeding five years.⁵

By *Stat. 1782. ch. 9. s. 2.* a general superintending

¹ Stat. 1783. ch. 32. s. 4.

² Stat. 1820. ch. 79. s. 4.

³ Stat. 1785. ch. 22. Stat. 1798. ch. 77. The equity powers, in cases of actions for forfeitures and bills to redeem mortgages, given by these statutes to the Court of Common Pleas, concurrently with the Supreme Judicial Court, and subject to an appeal to the Supreme Judicial Court, are the only equity powers it possesses.

⁴ Stat. 1799. ch. 81. s. 7. and see Stat. 1782. ch. 14. s. 3.

⁵ Stat. 1832. ch. 130. s. 3.

power is given to the Supreme Judicial Court over all the inferior courts of the Commonwealth, by *certiorari*, *mandamus*, *quo warranto*, &c: and this court is vested generally with the powers which appertain to the court of King's Bench in England.

Chancery jurisdiction. By *Stat.* 1785. *ch.* 22. chancery powers are given to the Supreme Judicial Court, concurrently with the Court of Common Pleas, in all causes instituted for the recovery of the forfeiture annexed to any "articles of agreement, covenant, contract, or charter-party, bond, obligation, or other specialty, or for forfeiture of real estate upon condition, by deed of mortgage, or bargain and sale with defeasance," — to enter judgment for such sum, as in equity and good conscience is due. Chancery power is in like manner given it, in relation to bills filed by mortgagors to redeem estates out of the hands of mortgagees, before the expiration of the equity of redemption.¹

The foregoing chancery power is the only one possessed by the Supreme Judicial Court, concurrently with the Court of Common Pleas, or with any other court. All its other equity powers are exclusive.

By *Stat.* 1817. *ch.* 87. power to hear and determine in equity, all cases of trust arising under deeds, wills, or in the settlement of estates, and all cases of contract in writing, where a party claims the specific performance of the same, where there is not a plain, adequate and complete remedy at law, is given to this court.

By *Stat.* 1818. *ch.* 122. *s.* 2. a more general chancery power is given to this court in relation to averaging

¹ *Stat.* 1798. *ch.* 77. And *vid.* *stat.* 1804. *ch.* 103. *Stat.* 1815. *ch.* 137. *Stat.* 1818. *ch.* 98. *Stat.* 1821. *ch.* 85. *Stat.* 1833. *ch.* 201.

losses in maritime cases, among the individuals liable thereto, with power to entertain bills of discovery.

By *Stat.* 1823. *ch.* 140. *s.* 1. power is given to the Supreme Judicial Court, on application by bill, petition or complaint, where property is secreted or withheld, to order the same to be delivered up, or compel such discoveries and disclosures, and make such orders, injunctions and decrees, as equity shall require.

By *sect.* 2. of the same statute, power is given to this court to hear and determine in equity, all disputes between copartners, joint-tenants, and tenants in common, and their legal representatives: And by *sect.* 3. in both the above cases, to issue all writs and processes necessary to the full effect of the powers granted.

By *Stat.* 1826. *ch.* 109. motions, interlocutory orders and decrees in equity, as to the time and mode of making them, and notices to parties thereof—the recording official determinations in equity—the appointment of Masters in Chancery, and the subject of costs in equity, are regulated. And by *Stat.* 1827. *ch.* 26. power is given to any justice of the Supreme Judicial Court, to issue either in term time or vacation, all writs and processes, necessary to carry into effect any decree, order or injunction, that may have been previously made or passed.

By *Stat.* 1827. *ch.* 88. power is given to this court to hear and determine in equity any matter touching waste or nuisance.

By *Stat.* 1828. *ch.* 60. power is given this court to authorize any receiver that may have been appointed in any case, to compound or give time for the payment of any demand in his hands.

By *Stat.* 1829. *ch.* 121. any one or more of the justices of the Supreme Judicial Court in term time, or

vacation, on complaint of any attaching creditor, may issue an injunction against any debtor, whose real estate has been attached, and who undertakes to cut and carry away the wood, or remove any fixtures therefrom, and stay such cutting and removal.

By *Stat.* 1830. *ch.* 90. the Supreme Judicial Court is authorized to hear and determine in equity, all matters relating to the donation of Benjamin Count Rumford, to the American Academy of Arts and Sciences.

By *Stat.* 1832. *ch.* 162. this court may hear and determine in equity all disputes and controversies between co-executors and co-administrators, and between their legal representatives, where there is no plain and adequate remedy at law.

SECT. II. COURT OF COMMON PLEAS.

The present Court of Common Pleas was created by *Stat.* 1820. *ch.* 79. and consists of one Chief Justice, and three associate Justices. Its jurisdiction extends throughout the Commonwealth, and the court may be holden for all purposes by one judge.

In civil actions.—The Court of Common Pleas has *original* and exclusive jurisdiction of all civil actions arising within the several counties, except the few cases of which, as we have seen, original jurisdiction is given to the Supreme Judicial Court, and excepting also the actions, where the damage claimed does not exceed the sum of twenty dollars, of which justices of the peace have original jurisdiction.¹

¹ *Stat.* 1807. *ch.* 123.

It has *appellate* jurisdiction of all civil cases, tried before a justice of the peace or before any Justices Court.¹

The jurisdiction of this court is *final* in all civil actions, where the *ad damnum* in the writ, does not exceed the sum of *one hundred dollars*.² Where it does exceed that amount, an appeal lies to the Supreme Judicial Court;³ and in all cases, exceptions lie from any judgment in the Court of Common Pleas to the Supreme Judicial Court.⁴

In criminal cases. — The criminal jurisdiction of the Court of Common Pleas, is derived from *Stat.* 1832. *ch.* 130.

By this statute, in all the counties in the Commonwealth, except that of Suffolk — the Court of Common Pleas has exclusive *original* jurisdiction of all crimes and misdemeanors, except those crimes which are punishable with death, and even these must be originally prosecuted in this court, though removed into the Supreme Judicial Court for trial.

It has *appellate* jurisdiction of all criminal cases tried before a justice of the peace,⁵ except in the county of Suffolk.⁶

¹ Stat. 1783. ch. 42. s. 3. Stat. 1821. ch. 109. s. 6.

² Stat. 1820. ch. 79. s. 4.

³ *Ib.*

⁴ *Ib.* s. 5.

⁵ Stat. 1783. ch. 51. s. 3.

⁶ Stat. 1800. ch. 44. s. 3.

Note.—In the county of Suffolk, the *original* criminal jurisdiction, which by *Stat.* 1832, is given to the Court of Common Pleas, in all the counties except Suffolk, is exercised by the Municipal Court of the city of Boston, concurrently with the Supreme Judicial Court, by virtue of *Stat.* 1812. *ch.* 133. with this difference, that in this county capital cases must be originally prosecuted in the Supreme Judicial Court.

The *appellate* criminal jurisdiction of cases, tried before a justice of the peace, which in all the counties except Suffolk, is vested in the Court of Common Pleas, in that county belongs to the Municipal Court, by *Stat.* 1800. *ch.* 44. s. 3.

The criminal jurisdiction of this court is *final* in all cases which it has power to try, except of those crimes which are punishable by confinement to hard labor for a term exceeding five years,¹ in which cases an appeal lies to the Supreme Judicial Court.² And in all criminal cases, exceptions lie to the Supreme Judicial Court.³

Chancery jurisdiction.—The chancery power of the Court of Common Pleas is confined to cases of bills by mortgagors to redeem, and actions brought to recover forfeitures for the non-performance of contracts. And this power it has concurrently with the Supreme Judicial Court, though an appeal lies from this court to the Supreme Judicial Court, in both the above cases.⁴

All writs of *audita querela* are made returnable to the Court of Common Pleas, except where they are brought to set aside or annul any proceedings had upon a writ of execution, issued by some other court, in which case the *audita querela* must be made returnable to the same court, to which the execution is.⁵

To this court is committed the power of ordering the sale of any land and its appurtenances, upon which any mechanic or other person has acquired a lien, by virtue of *Stat. 1819. ch. 156*. Such lien, however, can only be created by contract in writing, duly recorded in the registry of deeds, and continues in force only six months after the last instalment falls due.

This court has power to assess the support of paupers upon their kindred, and to order with which the pauper shall reside, upon the complaint of any town in which the pauper has his legal settlement, and which has been charged with the support of such pauper, or

¹ Stat. 1832. ch. 130. s. 1.² *Ib.* s. 3.³ *Ib.* s. 5.⁴ Stat. 1785. ch. 22. Stat. 1798. ch. 77.⁵ Stat. 1780. ch. 47.

upon the complaint of any kindred who have been so charged.¹

This court has power also to discharge apprentices who are bound out by the overseers of the poor, from their indentures, in case of improper treatment by the master.²

This court has also jurisdiction in cases of prosecution under the bastardy law.³

All awards made under rules entered into before justices of the peace, must be returned to the Court of Common Pleas, and this court alone has power to enter up judgment, and issue execution upon them.⁴

The Court of Common Pleas, concurrently with the Supreme Judicial Court, may issue writs of *habeas corpus*, where a minor enlists into the United States Army.⁵ In all other cases, this power belongs exclusively to the Supreme Judicial Court.

SECT. III. COURTS OF PROBATE.

The present Courts of Probate were established by *Stat.* 1817. *ch.* 190. the first section of which provides “that a Court of Probate shall be held within the several counties of the Commonwealth, and there shall be, in the manner the constitution directs, some able and learned person in each county of the Commonwealth appointed, or to be appointed Judge, for taking

¹ Stat. 1793. ch. 59. s. 3. *Andover v. Salem*, 3 Mass. Rep. 436. *Sayward v. Alfred*, 5. Mass. Rep. 244.

² Stat. 1793. ch. 59. s. 5.

³ Stat. 1785. ch. 66. s. 2. [*Note.* In the county of Suffolk, this power is exercised by the Municipal Court.]

⁴ Stat. 1786. ch. 21. s. 3.

⁵ Stat. 1814. ch. 136. s. 3.

the probate of wills, and granting administrations on the estates of persons deceased, being inhabitants of, or resident in the same county, at the time of their decease, or having died without the Commonwealth, and leaving estate of any kind, within the same; for appointing guardians to minors and other persons; for examining and allowing the accounts of executors, administrators, or guardians; and for such other matters and things as the Courts of Probate, within the several counties aforesaid, shall, by law, have cognizance and jurisdiction of." The Judges of Probate, by the same section are vested with all powers necessary to the discharge of the trust reposed in them.

By *sect. 10.* of the above statute, Courts of Probate have the same authority which the courts of common law have, upon petition, to empower and license executors, administrators, and guardians of minors, or others, to sell the real estate of their testators, intestates, and wards respectively, for the payment of just debts and legacies, with incidental charges, including (by *Stat, 1818. ch. 112. s. 3.*) charges of administration, provided notice be first given to all persons interested.

By *sect. 24.* of the above statute, the Judge of Probate is authorized to cause such division of the real estate of any person deceased to be made among the heirs and devisees, as to him shall seem most expedient and advisable. If there be an actual division of such estate among the heirs and devisees, it shall be by a committee of three discreet and disinterested freeholders under oath. But where an actual division cannot take place without great prejudice to the estate, the judge may assign the whole to one, or to so many of the heirs or devisees as the same will conveniently accommodate ;

those to whom the estate is assigned paying or securing to the others the value of their shares.

The Judges of Probate exercise a superintending jurisdiction over the rights and property of minors. Their guardians are required to return an inventory of all their property into the probate office, and the judge may dismiss them, after notice, whenever he deems it expedient or necessary.¹ Trustees of the estate of minors, or other persons, are also bound to give bond to the Judge of Probate for the faithful execution of their trust, to return an inventory and render an annual account, and to deliver up the property at the expiration of their trust.²

By *Stat. 1830. ch. 45.* “the Courts of Probate of the respective counties in this Commonwealth, shall have authority, upon the petition of guardians of minors and others, executors and administrators, to license the sale by auction of the real estate of their wards, testators and intestates, in all cases where the Supreme Judicial Court now have authority to grant such license; and the person or persons so licensed shall give the bond, notice, and take the oath which are now by law required, when license is granted by the Supreme Judicial Court.”

SECT. IV. JUSTICES OF THE PEACE.

By *Stat. 1783. ch. 42.* justices of the peace are authorized to try civil cases where the amount claimed is less than four pounds, (by *Stat. 1807. ch. 123. ex-*

¹ Stat. 1817. ch. 190. s. 34, 35, 36.

² Stat. 1817. ch. 190. s. 37.

tended to *twenty dollars*,) and where the title to real estate is not drawn in question. Wherever the defendant by way of justification pleads the title of himself or another, the justice shall cause him to recognize to the adverse party, in a reasonable sum, with sufficient surety or sureties, to enter the said action at the next Court of Common Pleas to be holden within the county, and to prosecute the same.

Justices of the peace are authorized to punish by such fine as is by the statute law of the Commonwealth provided, all assaults and batteries that are not of a high and aggravated nature. They shall examine into all homicides, murders, treasons, and felonies done and committed in their counties, and commit to prison all persons guilty or suspected to be guilty of manslaughter, murder, treason or other capital offence. They shall hold to bail all persons guilty or suspected to be guilty of lesser offences, which are not cognizable by a justice of the peace, and require sureties for the good behavior of dangerous and disorderly persons.¹

By *Stat. 1804. ch. 143. s. 2.* it is enacted that justices of the peace, within their own counties, shall have concurrent jurisdiction with the courts of the Commonwealth, of all larcenies where the money, goods or other article or articles stolen shall not be alleged to exceed in amount or value the sum of five dollars.

Justices of the peace are authorized to stay and arrest all affrayers, rioters, disturbers or breakers of the peace, and bind them to keep the peace, and for want of sureties to commit them to prison. They may also punish the breach of the peace in any person, that

¹ Stat. 1783. ch. 51.

shall assault or strike another, by fine to the Commonwealth, not exceeding twenty shillings, and require sureties for good behavior, or bind the offender to appear before such courts as have jurisdiction of his offence.¹

Justices of the peace have various miscellaneous powers and duties, an enumeration of which does not come within the plan of this treatise, but which may be easily learned from the several statutes prescribing them.

¹ Stat. 1794. ch. 26.

CHAPTER IV.

ATTORNIES.

At common law the plaintiff and defendant could generally appear in court only in *propria persona*; and no one was allowed to appear for another, except by the king's special permission, by writ or letters patent; by reason whereof, says Lord Coke, there were but few suits.¹ But a corporation aggregate not being capable of a personal appearance, could only appear by an attorney, who must have been appointed under the common seal.²

By *Stat. 13 Anne, ch. 1.* re-enacted by *Stat. 1785. ch. 23.* it is provided that parties may manage their causes for themselves, or by the assistance of such counsel as they shall see fit to engage, each party, however, being restricted to two, so "that the adverse party may retain others of them." — This statute having perhaps been construed to restrict parties to an appearance by those who were known as *attornies*, the *Stat. of 1789. ch. 58.* was passed, empowering every citizen to appear by any person of a *decent and good moral character*, whom he shall specially appoint by letter of attorney.

The only exceptions to the general rule allowing all parties to appear by attorney, are the cases of *infants*, *femes covert*, and persons *non compos mentis*. Infants must sue by *prochein amy*, or guardian, and defend

¹ Co. Litt. 128 a. 1 Mod. Rep. 244. *Jackson, ex. d. Smith et al. v. Stewart*, 6 Johns. Rep. 34.

² Com. Dig. tit. *Pleader*, 2 B. 2. Co. Litt. 66. b.

by guardian and not by *prochein amy*.¹ Married women must appear in person, for the purpose of pleading coverture.² In the English practice, it is said, that *idiots* must appear, either to sue or to defend, in person, but that *lunatics* must appear by guardian if within age, and by attorney, if of full age.³ In *Mitchell et al. v. Kingman*,⁴ it was held that a defendant who was *non compos* had no right to appear and plead by attorney — that a plea so made would be treated as a nullity, and if the fact appeared at the time of trial, a guardian would be appointed who might plead *de novo*.

By *Stat. 1785. ch. 23.* no person shall be admitted an attorney in any court in this Commonwealth, unless he is of good moral character, well affected to the constitution and government of the Commonwealth, and hath had opportunity to qualify himself for the office, and hath made such proficiency as will render him useful therein.

The rules regulating the admission of attornies in the Supreme Court and Court of Common Pleas will be found in the Appendix.⁵

Attornies are thus officers of the court; they are required to take an oath of fidelity to the courts as well as to their clients, and oaths to support the constitutions respectively of the United States and of the Commonwealth. As such officers, they are subject to the control and superintendence of the court, and may

¹ 2 Saund. 117. *f. note 1.* 2 Saund. 212. *a. note 4.* *Miles v. Boyden.* Exor. 3 Pick. Rep. 213.

² *Oulds and al. v. Sansom*, 3 Taunt. Rep. 261.

³ *Beverly's case*, 4 Co. 124. 2 Saund. 333. *note 4.*

⁴ 5 Pick. Rep. 431.

⁵ Reg. Gen. Supreme Judicial Court, Appendix A. Reg. Gen. Court of Common Pleas, Sec. 1, 2, 3, 4, 5, 6. Appendix B.

be compelled to perform their duties, and punished for misdemeanors and malpractice committed in their official capacity.

The members of the profession in England are divided into distinct classes, entirely separate from each other; the attornies in the common law courts, and solicitors in equity, manage the commencement and preparation of suits, and conduct them in all that portion which is done out of court or on the record; while the barristers, serjeants, and counsel are employed in conducting the oral business in court, making motions, and arguing causes. The two functions cannot be united in the same person—an attorney cannot become a barrister till his name is stricken from the roll of attornies. In this State there is no such division except that in the Supreme Court attornies are not permitted to practise as counsellors until after two years from their admission as attornies. All counsellors are of course attornies. The attornies of the Court of Common Pleas are also counsellors of that court.

SECT. I. WARRANT OF ATTORNEY.

It was formerly necessary that the appointment of an attorney in any court should be in writing, and attornies were required under a penalty, to file their powers in court. The practice not only of filing, but even of taking, the warrants of attorney, is said to have been for the most part long since disused, and a mere parol retainer is deemed a sufficient authority.¹

If the defendant suspects that the suit has been commenced without the authority of the plaintiff on

¹ 1 Archb. Pract. 22.

the record, he may call on the plaintiff's attorney for proof of his authority. By the 27th rule of the Court of Common Pleas, the attorney's right to appear cannot be questioned except at the first term;¹ but this must be understood to mean, that the defendant shall not, after that time, call on the attorney to show his power, and not that the defendant may not show his want of power. He may prove affirmatively at any time that the suit is prosecuted without the consent of the plaintiff, and it will be dismissed. In *First Parish of Sutton v. Cole*,² it was held that the defendant, by not disputing before plea filed, the authority of the plaintiff's attorney, was precluded from afterwards contending that the plaintiffs were not regularly organized as a corporation, or that the meeting at which the proceedings were directed to be commenced, was not regular and valid.

The authority may be given by a formal letter of attorney under seal, or by a written retainer, or it may be shewn by proof of any act implying it, or recognizing the suit, as that the plaintiff himself endorsed the writ, or that the attorney has possession of the instrument upon which the suit is brought, if it be a contract with the plaintiff himself. By the rule above referred to, a declaration by the attorney himself that he was employed by the party himself, or by some one whom he believed was duly authorized to employ him, shall be deemed to be evidence of an authority to appear. But this evidence must be considered as merely *prima facie*, for the defendant may undoubtedly disprove the fact or show a disclaimer by the plaintiff. It may well be questioned whether the rule itself be founded in good policy, and whether the exercise of it comes within the powers of

¹ Appendix B.

² 3 Pick. Rep. 232.

the court. To compel a defendant to answer a suit because an attorney *believes* he is authorized, is going very far.

An attorney who receives a note from his client to collect, is warranted by his general retainer, to bring a second suit upon the note, after being nonsuited in the first for want of due proof of its execution.¹ The attorney of record for the plaintiff in a suit where bail was taken, has power, of course, to sue out a *scire facias*, against the bail, if *non est inventus* be returned on the execution.² And he may bring a writ of error, to reverse an erroneous judgment against his principal.³ But it seems he cannot sue out a *scire facias* on the judgment, for that requires a new retainer. Where a right of action has been assigned for a valuable consideration, the assignment includes a power to prosecute the suit in the name of the assignor, although no express power be given; and the suit may be prosecuted, without the consent, or even against the express dissent of the nominal plaintiff.⁴ Thus if a nominal plaintiff should personally appear in court and request that the suit might be dismissed, the court will not grant the request, if proof be given of an assignment, whether written or verbal, to the person by whom or in whose behalf the suit is prosecuted. But if the payee of a negotiable note indorse it, the indorsee cannot from that circumstance, without the special authority of the indorser, maintain a suit in his name. It is not neces-

¹ *Scott v. Elmendorf*, 12 Johns. Rep. 315.

² *Dearborn v. Dearborn*, 15 Mass. Rep. 316.

³ *Grosvenor v. Danforth*, 16 Mass. Rep. 74.

⁴ Salk 86. Say. 218. *Boylston v. Greene*, 8 Mass. Rep. 465. *Jones v. Witter*, 13 Mass. Rep. 304. *Eastman et al. v. Wright et al.* 6 Pick. Rep. 316.

sary for the purpose of giving the transfer effect, and no authority therefore can be implied to use the indorser's name.¹ In cases of trusts, the *cestui que trust* has a similar right to use the name of the trustee. And the principle embraces all cases where one person, to enforce his equitable rights, is obliged to sue in the name of another who has no interest in the suit.² So if one of several partners, or other joint owners of a chose in action, assign his interest to the other partners or owners, the assignment will be recognized and enforced by permitting the others to use the names of all.³ The plaintiffs, however, must be mere trustees. The rule does not extend to cases where the plaintiffs maintain the action in their own right, and have an interest in the judgment. If one partner or joint contractor, unjustly refuses to suffer his name to be used in a joint action, the others cannot proceed in it, but must take their remedy against the party refusing, by a special action on the case.⁴ When one party has thus a right to use the name of another, he has, it seems, the same right to use the name of his executor or administrator, if he be dead.⁵

When the owner of land is disseized and makes a sale and conveyance of the land to a person who is not in possession, the purchaser cannot maintain a suit, to

¹ *Mosher, Exor. v. Allen*, 16 Mass. Rep. 451.

² *Payne v. Rogers*, Dougl. Rep. 407. *Locke v. Franklin*, 7 Taunt. Rep. 9.

³ *Mountstephen et al. v. Brooke et al.* 1 Chitty Rep. 390. *Arton et al. v. Booth*, 4 Moore. Rep. 192.

⁴ *Eastman et al. v. Wright et al.* 6 Pick. Rep. 316. *Wilson v. Mower*, 5 Mass. Rep. 407. See also *Loring et al. v. Brackett*, 3 Pick. Rep. 403.

⁵ *Alsop v. Caines*, 10 Johns. Rep. 396. *Raymond v. Johnson*, 11 Johns. Rep. 488.

recover it in the name of the grantor, without his consent; but if he do consent, or if, the suit being commenced without his knowledge, he afterwards assent to it, it will be sufficient.¹ Any person may bring an action in the name of an infant, as his *prochein amy*.²

By *Stat.* 1786. *ch.* 58. *s.* 6. in any stage of the proceedings upon process *de homine replegiando*, any person shall be permitted to appear for the plaintiff, who will stipulate as the court shall direct for the payment of all costs and damages, although he can produce no special power for that purpose.

By *Stat.* 1794. *ch.* 65. *s.* 2. any person cited as trustee, having any goods, effects, or credits of the principal in his hands, may appear in his behalf, and in his name plead, pursue, and defend to final judgment.

SECT. II. DISABILITIES TO APPEAR AS ATTORNIES.

By *Stat.* 1815. *ch.* 49. *s.* 1. no person shall engage or be employed as counsel or attorney, before any court, in any action which he shall have determined as judge or justice of the peace.

By *Stat.* 1817. *ch.* 190. *s.* 4. no judge of Probate shall be allowed or admitted to have a voice in judging and determining, nor be permitted to be of counsel or to act as an attorney, whether in or out of court, in any civil action or other process or matter whatsoever, which may depend on, or have relation in any way to, any sentence or decree, made or passed by him in his office. Nor shall he be of counsel or attorney in

¹ *Cleverly v. Whitney*, 7 Pick. Rep. 36.

² See *Miles v. Boyden*, 3 Pick. Rep. 213. *Smith v. Floyd*, 1 Pick. Rep. 275.

any civil action, for or against any executor, administrator, or guardian, as such, within the county in which said judge shall preside. No register of probate shall be of counsel, or in any way, directly or indirectly, act as an attorney in any matters or things whatsoever that are or may be pending in the Court of Probate of which he is register, or in any appeals therefrom.

By *Stat.* 1807. *ch.* 18. *s.* 2. no attorney general, solicitor general, or county attorney, shall receive any fee or reward, from or in behalf of any prosecutor for services in any prosecution, or during the pendency of such prosecution ; or be concerned as counsel or attorney for either party in any civil action depending on the same facts.

By *Stat.* 1783. *ch.* 44. *s.* 3. no sheriff or deputy sheriff shall be suffered to appear in any court or before any justice of the peace, as attorney to, or in behalf of, assisting or advising any party in a suit, nor shall any sheriff or his deputy be allowed to draw, make, or fill up any plaint, declaration, writ, or process, or to draw or make any plea for any other person ; but all such acts done by either of them shall be void.¹ By *Stat.* 1822. *ch.* 20. *s.* 1. similar provisions are made with respect to constables.

No record is necessary or usual, where an infant is plaintiff, of the admission of his *prochein amy* to sue.² The respective courts in which suits are commenced, must assign a proper guardian to the infant ; and therefore if an infant is sued, the plaintiff must move to have a proper guardian assigned him.³ This is true of all courts—and if the plaintiff omit to procure the appointment of a guardian *ad litem*, no judgment which

¹ *Clarke et al. v. Lyman*, 10 Pick. Rep. 45.

² *Miles v. Boyden*, 3 Pick. Rep. 213. ³ *Bac. Abr. Infancy, &c.* K. 2.

he can recover will avail him, if the defendant should afterwards choose to bring a writ of error.

It is scarcely necessary to remark that no person can appear as an attorney for both parties, though by their consent. Such a proceeding would be deemed highly reprehensible.¹

SECT. III. AUTHORITY, AGREEMENTS, ADMISSIONS, AND GENERAL POWERS OF ATTORNIES.

The mere appearance of an attorney for the defendant is always deemed sufficient for the opposite party, and for the court, who will look no further, and will proceed as if he had sufficient authority, and leave any party who may be injured to his action, unless there appears to be fraud or collusion in the case.² The public office which he bears, the oath under which he acts, and it may be added, the experience of the general integrity and fidelity of the profession, have operated to establish a usage, and make that usage law, that except in extreme cases, the appearance of an attorney for a party, although in fact without authority, shall bind him. The case is strongly analogous to that of sheriffs and other returning officers. Their returns are taken to be true and not permitted to be contradicted, and if false, the remedy is by an action against them. Chief Justice Marshall says, in *Osborn et als. v. Bank of United States*,³ “the practice

¹ Bac. Abr. Attornies, C. 7 Mod. Rep. 47.

² *Jackson d. Smith v. Stewart*, 6 Johns. Rep. 34. 1 Salk 86. *Osborn et als. v. Bank of U. S.* 9 Wheat. Rep. 738. *Denton v. Noyes*, 6 Johns. Rep. 296.

³ 9 Wheat. Rep. 738.

has existed we believe since the first establishment of our courts, and no departure from it has been made in the courts of any state or of the Union." Kent, Ch. J. says,¹ in the case of *Denton v. Noyes*, "by licensing attornies, the courts recommend them to the public confidence; and if the opposite attorney, in the business of a suit, must always, at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience;" and that "the mere fact of his appearance is always deemed enough for the opposite party, and for the court. If his client's denial of authority is to vacate all the proceedings, the consequences would be mischievous. The imposition might be intolerable."

The principle of these cases has been recognized and adopted by the Supreme Court of this state.²

The rule that the authority of an attorney shall be presumed, and his acts be binding on the person for whom he appears, though he was never authorized, has not been applied to acts and transactions out of court.³

All *agreements* made by an attorney with the opposite party, and entered on the record, are binding on his client. So if made in writing and filed in the case. As to agreements not in writing, there may be doubts how far the courts will enforce them, or whether the performance must not be left to the honor of the attorney. In case of the death or change of the attorney who made them, his successor and the client would be

¹ 6 Johns. Rep. 302.

² *Smith v. Bowditch*, 7 Pick. Rep. 137.

³ See *Hart v. Waterhouse*, 1 Mass. Rep. 433. *Herring et al. v. Polley*, 8 Mass. Rep. 113.

without means of knowing them. If clearly proved, care would be taken, that the other party should not suffer, and perhaps performance would be compelled; but there is so much danger of mistake and disagreement, and attornies so frequently differ with respect to them, that it should be adopted as an invariable rule, to put in writing all important agreements, and it would be a high degree of negligence to omit it.

In the case of the *Union Bank of Georgetown, v. Geary*,¹ the bank having commenced suits against the maker and indorser of a promissory note, the indorser consented to be defaulted on the agreement of the attorney of the bank, that the bank should immediately issue execution against the maker, and levy it on his property. The agreement was verbal and was made without the knowledge of the bank, or any authority to the attorney except that of being employed to bring suits on the note. It was held by the Supreme Court of the United States to be within the authority of the attorney, and binding on the bank, and they having refused to execute it, in consequence of which the maker was permitted to remove his property, and afterwards became insolvent, an injunction was granted forbidding them to enforce the judgment against the indorser.

Admissions made by attornies with a view to their being used as evidence may be so used;² but casual admissions, in the course of conversation, or not made for that purpose, are not evidence against the client.

An attorney has power under his general authority, to do every thing that is necessary to the regular and proper conducting of the suit in which he acts;—he

¹ 5 Peter's Rep. 99. Vide *Griswold v. Lawrence*, 1 Johns Rep. 507.

² 2 Stark Ev. 136.

may become nonsuit or confess judgment upon such terms as he thinks proper, subject however to the interference of the court in case of collusion or fraud.¹ An attorney of record has power to refer the suits, for he is authorized to prosecute or defend, and this is one of the legal modes of prosecuting and defending. But he has not power to compromise the suit.² He may appeal from a judgment of the Court of Common Pleas or a justice of the peace, and enter into the recognizance to prosecute the appeal in his client's name, and may himself be a surety in the recognizance.³

The authority of an attorney continues until judgment, and for a year and a day after, to sue out execution, and for a longer time if he continues the execution alive and in force.⁴ After judgment has been recovered, the attorney of record has authority to receive the amount, either upon the execution or without it, and to discharge the judgment and execution. But he has no authority to discharge the debt upon receiving a less sum than the amount recovered, nor upon receiving collateral security to an amount larger than the debt.⁵ Nor can he discharge the debtor from imprisonment without satisfaction.⁶ And if the gaoler permit him to depart on such an order, he will be liable for an escape.⁷

The authority of the attorney after judgment will cease, if the client himself assumes the management

¹ *Crary v. Turner*, 6 Johns. Rep. 51.

² *Buckland v. Conway*, 16 Mass. Rep. 396. *Holker et al. v. Parker*, 7 Cranch Rep. 436. Bac. Abr. Attorney, D.

³ *Adams et al. v. Robinson et al. and trustees*, 1 Pick. Rep. 461.

⁴ Bac. Abr. Attorney, D. 5 Peters' Rep. 99.

⁵ *Parker v. Downing*, 13 Mass. Rep. 465.

⁶ *Langdon et al. v. Potter et al.* 13 Mass. Rep. 319. *Lewis v. Gamage et al.* 1 Pick. Rep. 347.

⁷ *Jackson d. McCrea v. Bartlett*, 8 Johns. Rep. 361. *Kellogg v. Gilbert*, 10 Johns. Rep. 220.

of the debt ; as if he take the execution into his own hands, paying the attorney his costs ; or in any way, revoke the power, and satisfy the lien.¹

SECT. IV. DUTIES AND LIABILITIES OF ATTORNIES.

Duties. The principal duties of an attorney are care, skill, and integrity. If he be not deficient in these requisites, he is not responsible for any error or mistake, arising in the exercise of his profession.² But for a deficiency in skill or care, by which a loss arises to his client, an attorney is liable.³ So if he disobey the lawful instructions of his client, and a loss ensue, he is responsible for it.⁴

And the duty of an attorney to his client is not confined merely to the original suit in which he is at first retained, but may extend to subsequent proceedings. Thus, if bail have been taken in an action, it is the duty of the attorney who has been employed therein, though not specially instructed upon the subject, seasonably to sue the bail ; and if, by his neglecting to do it, his client loses the benefit of the judgment recovered, he is liable to pay its amount.⁵ So it is the duty of an attorney, who has been retained in an action, in which an erroneous judgment has been rendered against his client, to institute process for the reversal of such

¹ *Parker v. Downing*, 13 Mass. Rep. 465.

² 1 Tidd's Pract. 255. *Pitt v. Yalden*, 4 Burr. Rep. 2060.

³ *Russell v. Palmer*, 2 Wils. Rep. 325. *Swannell v. Ellis, et al.* 1 Bing. Rep. 347.

⁴ *Gilbert v. Williams*, 8 Mass. Rep. 51.

⁵ *Dearborn v. Dearborn*, 15 Mass. Rep. 316 ; but vide *Burr v. Atwood*, 1 Salk, Rep. 89.

judgment, although he have received no special instructions from his client to do so.¹

An attorney is not bound to produce any paper entrusted to him by his client.²

It was formerly supposed that attornies were compellable to act.³ But it is now holden, that they cannot be compelled to appear, until they have received a retainer, which, however, they may refuse. But having appeared, they may be compelled to proceed in the suit.⁴

Liabilities. — An attorney is liable to his client, only for want of care, skill or integrity.

Attornies are liable to the officers of court, for the fees accruing on the performance of their official duties, and an attachment is the appropriate remedy to compel payment of them.⁵ They are likewise responsible to sheriffs, coroners, &c. for their fees on the service of such writs and executions as they give them to execute.⁶

By the 26th rule of the Court of Common Pleas, when a cause is opened to the jury, and the jury fees remain unpaid, the counsel for the plaintiff or appellant is made responsible for them.⁷

If an attorney, after a demand made, or directions given to remit,⁸ neglect to pay over money collected by him, in addition to his liability to his client, the

¹ *Grdsvenor v. Danforth*, 16 Mass. Rep. 74.

² Anon. 8 Mass. Rep. 370. *Jackson ex. d. King et al. v. Burtis et al.* 14 Johns. Rep. 391.

³ Co. Litt. 295. a.

⁴ Anon. 1 Salk. 87. Vide 8 Cowen. Rep. 253.

⁵ *Caldwell v. Jackson*, 7 Cranch. Rep. 276. Anon. 2 Gall. Rep. 101.

⁶ *Adams v. Hopkins*, 5 Johns. Rep. 252. *Ousterhout v. Day*, 9 Johns. Rep. 114.

⁷ Appendix B.

⁸ 5 Cowen. Rep. 376. 6 Cowen. Rep. 596.

court will grant a rule to shew cause why an attachment should not issue against him.¹ And, in some instances, the court will order an attorney to pay costs to his own client for neglect, or to the opposite party for vexatious and improper conduct.²

In general, attornies are immediately under the control of the courts, in which they are admitted to practise; and they are liable to be proceeded against in a summary way, either by attachment, or by having their names stricken from the rolls, for any malpractice of which they may be guilty.³

In a regular complaint against an attorney, the charges made must be sworn to unless the attorney waive this requisition, which he may do. This is not the practice, however, when the complaint comes from the bar. But the testimony, in all cases, ought to be given under oath.⁴ When an attorney is charged by affidavit, with any fraud, or malpractice, or with any conduct rendering him unfit for the profession, the court, on motion, will order him to answer the matters contained in the affidavit; and, in general, if he deny the facts contained in the affidavit, the court will dismiss the complaint.⁵ But in a case where an attorney who had been required to answer to an affidavit, swore to an incredible story in his exculpation, the court granted an attachment against him, notwithstanding his positive denial of the malpractice charged.⁶

¹ *The People v. Smith*, 3 Caines' Rep. 221. *The People v. Wilson*, 5 Johns. Rep. 368. Say. 51. 169.

² Say. 50. 172. *Rex v. Fielding*, 2 Burr. Rep. 654. *Thomas v. Vandermoolen*, 2 Barn. and Ald. Rep. 197. *Bartley v. Godslake*, Ibid. 199.

³ 1 Sell. Pract. 28. *The People v. Smith*, 3 Caines' Rep. 221. Vide 4. Term. Rep. 371, note b.

⁴ *Ex parte Burr*. 9 Wheat. Rep. 529.

⁵ Imp. K. B. 83. Bac. Abr. Attorney, H. 2. 1 Arch. Pract. 30, 32.

⁶ *Crossley et als. Attornies*. 6 Term. Rep. 701.

It is not usual, however, for the court to interfere in a summary way, for a mere breach of promise, where there is nothing criminal,¹ nor on account of mere negligence or unskilfulness on the part of an attorney,² except it be very gross; nor where his misconduct is not connected with his profession.³ But if his misconduct have been very aggravated, as if he have been convicted of felony, or have committed any offence, which renders him unfit to be continued as an attorney, the court will order his name to be stricken from the roll.⁴

By the 21st rule of the Court of Common Pleas, counsellors and attornies are prohibited from becoming bail, in any cause pending in that court.⁵ This rule is conformable to that of the English courts upon the same subject, and it there extends not only to cases where the party actually becomes bail, but to a promise to indemnify bail.⁶ Becoming sureties for sheriffs or coroners, is within the mischief intended to be prevented by this rule.

SECT. V. LIEN OF ATTORNIES.

At common law, an attorney has a lien for his costs, upon any papers of his client, which may come into

¹ *Beal v. Langstaff*, 2 Wils. Rep. 371.

² *Pitt v. Yalden*, 4 Burr. Rep. 2060. Loft. 188.

³ *Say*, 50, 169.

⁴ *Ex parte Brounsall*. Cowp. Rep. 829. 2 Black. Rep. 991. *The King v. Southerton*, 6 East. Rep. 143.

⁵ Appendix B.

⁶ 1 Sell. Pract. 161.

his hands.¹ And this is not confined to any particular case, but extends to his whole account.²

An attorney has, also, a lien for his costs, upon the judgment recovered by his client,³ or on an award in favor of his client,⁴ in a cause in which the attorney was employed, even although the client have previously become a bankrupt.⁵ This lien, however, is not a general one.

So also, if money belonging to his client come to the attorney's hands, he may retain so much of it, as will satisfy his costs.⁶ Or he may stop it in transitu, by giving notice to the opposite party not to pay it until his claim for costs be satisfied, and then moving the court to have the amount of his costs paid to him in the first instance.⁷ And if the opposite party, after notice of the attorney's lien, pay over the money to the client, he is still liable to the attorney for the amount of his lien.⁸ If, however, the opposite party make a *bona fide* compromise of the suit, without notice of the lien, he cannot be compelled to pay the attorney his costs.⁹ But the attorney, in such a case, shall not be prejudiced by any collusive release given by his client.¹⁰

¹ *Hughes v. Mayre*, 3 Term. Rep. 275. *Mitchell v. Oldfield*, 4 Term. Rep. 123.

² *Stevenson et al. v. Blakelock*, 1 Maule. and S. Rep. 535. *Lambert v. Buckmaster*, 2 Barn. and Cress. Rep. 616.

³ *Turnin v. Gibson*, 3 Atk. Rep. 720. *Middleton v. Hill et al.* 1 Maule. and S. Rep. 240. *Randle v. Fuller*, 6 Term. Rep. 456. *Glaister v. Hewer et als.* 8 Term. Rep. 69.

⁴ *Ormerod v. Tate*, 1 East. Rep. 464.

⁵ *Griffin v. Eyles*, 1 H. Black. Rep. 122.

⁶ *Welsh v. Hole*, Dougl. Rep. 238.

⁷ *Wilkins v. Carmichael*, Dougl. Rep. 104.

⁸ *Read v. Dupper*, 6 Term. Rep. 361. *Welsh v. Hole*, Dougl. Rep. 238.

⁹ *Chapman et al. v. Haw*, 1 Taunt. Rep. 341. *Pinder v. Morris*, 3 Caines' Rep. 165.

¹⁰ *Ormerod v. Tate*, 1 East. Rep. 464.

If the defendant, after action brought, pay the debt to the plaintiff, without the knowledge of the attorney, and without discharging the costs, it seems that the attorney has a right to proceed in the action for the recovery of them.¹ And if a plaintiff collude with the defendant's bail and attorney, to deprive the plaintiff's attorney of his costs, by settling the debt and accepting a part payment, without his intervention, it seems that he may proceed against the bail, in order to recover such costs.² But if the plaintiff and defendant collusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the latter cannot sue out another execution upon the same judgment, to levy his costs, but must apply to the court.³

The attorney's lien extends only to the net balance due, after the charges of the opposite party in that suit are deducted, and does not affect the equitable right of set-off between the parties, and therefore, if in the same action in which the plaintiff recovers damages, the defendant recovers costs, the court will allow one to be set off against the other, without regard to the attorney's lien.⁴

Notwithstanding the common law thus provided for the security of attornies, it was holden by our court in the case of *Getchell v. Clark*,⁵ that an attorney, in this State, had no lien upon the suit for his fees, and that if

¹ *Toms v. Powell*, 6 Esp. Rep. 40. S. C. 7 East. Rep. 536; but vide *Charlwood et al. v. Berridge*, 1 Esp. Rep. 345. *Martin v. Francis*, 1 Chitty Rep. 241. S. C. 2 Barn. and Ald. Rep. 402.

² *Swain v. Senate*, 5 Bos. and Pull. Rep. 99.

³ *Graves v. Eades*, 5 Taunt. Rep. 429. S. C. 1 Marsh. Rep. 113.

⁴ *Schoole v. Noble, et als.* 1 H. Black. Rep. 23. And vide *Howell et als. v. Harding*, 8 East. Rep. 362. 1 Arch. Pract. 39. and cases there cited.

⁵ 5 Mass. Rep. 309.

the plaintiff discharged the defendant either before or after judgment, the only remedy for the attorney, was by an action against his client for his fees. But it has since been holden, that the *Stat.* 1801. *ch.* 84. which directs the setting off of one execution against another, where the creditor in one is the debtor in the other, but which expressly provides, that this direction shall not affect or discharge the lien, which any attorney may have upon any judgments or executions, for his fees or disbursements,—amounts to a legislative declaration, that such lien may exist.¹

Whether an attorney has a lien for his fees, upon the papers of his client in his hands, has never been expressly settled in this State; but there seems to be no reason why he should not according to the common law, which remains unaltered in this respect.

SECT. VI. PROCEEDINGS IN CASE OF THE DEATH, REMOVAL, OR CHANGE OF ATTORNEY.

In case of the death of an attorney prosecuting or defending a suit, another may enter his appearance upon the docket, without any formal motion to the court.

In the English and New York practice, in case of the change of an attorney, the person withdrawing must move the court for leave to withdraw his appearance, stating a sufficient reason, such as the assent or wish of his client, or that his client neglects or refuses to advance the fees and charges necessary for the prosecution or defence of the suit. And where an attorney has been retained to defend a suit, and appears,

¹ *Baker v. Cook*, 11 Mass. Rep. 236. *Dunklee v. Locke*, 13 Mass. Rep. 525.

the defendant is not allowed to countermand the appearance, or change his attorney without rule of court.¹ The acts of the second attorney, unless a regular substitution be shown, will be disregarded by the court.²

But in our practice, any party may dismiss his attorney and appoint a new one at pleasure, without application to the court. The most regular mode of doing this, is by a letter of attorney to the new one, revoking the former power. This, when filed in the case, is effectual to take away the power of the former, and to substitute the latter, provided notice of the change is given to the opposite party,³ and subject, perhaps, to the existing lien of the first attorney, for fees and disbursements. If the attorney so dismissed, should persist in appearing, and keep his name upon the docket, the court, on application, would order him to withdraw.

The attorney newly appointed must take notice at his peril, of the rules to which the former attorney was liable, and is bound by his lawful agreements.

¹ 1 Arch. Pract. 29. 1 Paine. & D. Pract. 196.

² Ibid.

³ 7th rule of S. J. C. Appendix, A.

CHAPTER V.

MODES OF INSTITUTING A SUIT.

Suits in the courts of this Commonwealth, are commenced by *petition*, *complaint*, *bill in equity*, *libel*, and *writ*.

Petition is the process by which one tenant in common or joint tenant of land, obtains a partition.

Complaint is the process for the owner of lands flowed by a mill dam.

A *bill in equity* is the only mode of instituting suits in equity, and is in the nature of a complaint and petition to the equity jurisdiction of the courts.

A *libel* is the process to obtain a divorce.

A *writ* is the most common means of instituting a suit at law, in real and personal actions, and it is to the practice in suits commenced by writ, that this treatise will be chiefly confined.

CHAPTER VI.

WRITS. FORMS OF WRITS IN GENERAL.

By the Constitution of Massachusetts,¹ all writs issuing out of the clerk's office in any of the courts of law, shall be in the name of the Commonwealth of Massachusetts: They shall be under the seal of the court from whence they issue: They shall bear *teste* of the first Justice of the court to which they shall be returnable, who is not a party, and be signed by the clerk of such court.

These provisions are much the same with those of the common law, and are not considered as deriving any additional solemnity or force from being inserted in the constitution, — the only effect of which is to make them unalterable by the legislature.² The *Stat.* 1820. *ch.* 79. *s.* 3. providing that writs issuing from the Court of Common Pleas shall bear teste of “one of the justices,” is so far void.³

The *Stat.* 1784. *ch.* 28. *s.* 3. requires the same formalities to be observed in writs issued by a justice of the peace.

Any mistake in the teste, seal, or signature of the writ, should be taken advantage of at the first term, by plea in abatement, or by motion to dismiss the action; a defect in either particular would be cured by

¹ Ch. VI. Art. 5.

² *Ripley, Exor. v. Warren, Admr.* 2 Pick. Rep. 592.

³ *Ibid.*

a general appearance, or by pleading to the merits of the action. It is a general rule, that where there has been any irregularity in the process, if the opposite party overlook it, and take subsequent steps in the case, he cannot afterwards object to the mistake.¹

The forms of writs in civil actions are prescribed by statute, and must be pursued in all cases to which they are applicable. In *Cooke v. Gibbs*,² Parsons, Ch. J. says, "where the legal remedy sought by the plaintiff may be obtained by a writ conforming to these outlines, he must sue out such a writ, and if the writ he shall sue, materially vary from those outlines, the court may *ex officio* abate it. But when the remedy he is entitled to cannot be obtained by any writ conforming in its outlines to those prescribed by statute, it has been the ancient and constant practice of the court to grant him a writ, by which he may obtain his remedy. Thus we have no form of writs of error, of review, or of scire facias against bail, or of execution in dower, where a woman has been divorced *a vinculo*; and yet when the remedy sought, required any writ of these kinds, the court have always granted it.

By an ancient *English* statute, the masters in chancery, whence all original writs issued, were authorized to form new writs in new cases, that there might not be a failure of justice. In this state, that authority when necessary, has been exercised by the court issuing the writ. Thus when an act passed, directing that

¹ 1 Tidd. Pract. 276. *Hart. Assignee &c. v. Weston*, 5 Burr. Rep. 2586.
² Black. Rep. 683. S. C. *Pearson v. Rawlings*, 1 East. Rep. 77. *Gilliland v. Morrell*, 1 Caines' Rep. 154. *Gordon et al. v. Valentine et al.* 16 Johns. Rep. 145. *Prescott v. Tufts*, 7 Mass. Rep. 209. *Ripley, Exor. v. Warren, Admr.* 2 Pick. Rep. 592.

³ 3 Mass. Rep. 193.

an execution should not issue against the body of a sheriff when in office, the court altered the form of the execution, given by the statute, so as to conform it to this act. By the constitution, no representative shall be arrested or held to bail on *mesne process*, while attending the General Court, or *eundo et redeundo*; but his estate may be attached, and when the plaintiff would attach his estate to secure his debt, a writ of attachment may issue, by which the officer is compelled to attach the estate and summon him. By law, executions do not lie against the bodies or estates of executors or administrators, on judgments against them for the debts of the deceased; and executions have been made conformable to this provision of law. So by *Stat. 1783. ch. 32. s. 9*, writs of attachment shall run only against the goods or estate of the party deceased in the hands of his executors or administrators, and not against their bodies. According to this section, and a former provincial law, of which it is a revision, writs have frequently issued commanding the officer to attach the goods and estate of a person deceased, and to summon the executor or administrator."

In the case last cited, the suit was in an action of debt upon a judgment, — an execution had been issued upon it, and the defendant committed thereon, and discharged by taking the oath prescribed by statute. The writ directed the sheriff to attach the goods and estate of the defendant, and to summon him to appear. The court, for the reasons before mentioned, held the writ to be good, though a departure from the form prescribed by the statute, the *capias* being omitted.

If a *capias* and attachment in such a case should issue, and the defendant be arrested upon it, he might abate the writ by a proper plea, and an action for false

imprisonment would lie against the plaintiff, for causing the defendant to be arrested upon the writ.¹

The reason of the departure from the forms prescribed by statute, must appear in the writ itself.²

¹ Ibid. *Willington v. Stearns*, 1 Pick. Rep. 497.

² *Cooke v. Gibbs*, 3 Mass. Rep. 193. *Goffe v. Preston and Trustee*, Worcester, Court of Common Pleas, Dec. 1, 1824.

CHAPTER VII.

VARIOUS KINDS OF WRITS.

The forms of original writs in use in our practice are :

1. Original Summons.
2. Capias.
3. Capias and attachment.
4. Summons and attachment.
5. Trustee process.
6. Review.
7. Scire facias.
8. Writ of Dower.
9. Replevin.
10. De homine Replegiando.
11. Audita querela.
12. Ejectment by landlord against tenant.
13. Habeas corpus.
14. Summons in process against forcible entry and detainer.
15. Summons in process for the speedy removal of nuisances.
16. Summons in process to recover damages for flowing lands.

SECT. 1. ORIGINAL SUMMONS.

This writ is so called to distinguish it from the summons which accompanies the writ of attachment. The form of it is given in *Stat. 1784. ch. 28. s. 1.* and for writs returnable before a justice of the peace, in *sect. 3.* of the same statute. The statute does not specify the cases in which it may be resorted to, but there seems to be no objection to adopting it in all cases, at the plaintiff's election. By the colony law of 1644.¹

¹ Ancient Charters. Chap. 49.

it was ordered, “that it shall be the liberty of every plaintiff to take out either summons or attachment against any defendant.”

The original summons is the most appropriate writ in real actions, and in actions against sheriffs, executors, administrators, &c. when it is not intended to attach property, — but there seems to be no case, in which the plaintiff is compelled to adopt it.

The writ simply directs the officer to *summon* the defendant to appear.

It is proper to observe that the judgment and execution, where this form of writ is adopted, will be in the common form, that is, against the property and person of the defendant, unless something appears on the record, to shew that it should be varied. Thus, if an action of debt should be brought upon a judgment, where the defendant has taken the poor debtor’s oath, he should plead in bar of execution against his body, — that he has been discharged in that mode. So also if he has been discharged by order of the creditor, to avoid liability for the expense of supporting him in prison, under *Stat. 1819. ch. 94. s. 2.*

SECT. II. CAPIAS.

SECT. III. CAPIAS AND ATTACHMENT.

These writs are precisely the same in form — the form being the second one given in *sect. 1. of Stat. 1784. ch. 28.* and also the second one in *sect. 3.* in cases triable before a justice of the peace. They differ only in the mode of service. There is a form of summons given with the writ in the statute. *With the summons*, the writ is an *attachment*; — *without it*, a mere *capias*, or in other words, the precept of the

writ in the form given, being in the alternative, either “to attach the goods or estate of the defendant” or “for want thereof, to take his body,”—if the writ, with the accompanying summons, is served according to the first command—it is a writ of *attachment*,—if without the summons and according to the second command, it is a *capias*. In the case *Commonwealth v. Sumner*,¹ the court say “there is no distinction in our statutes, between a *capias* and writ of attachment; they are one writ with different powers according to the will of him who uses them.”

The form of writ now under consideration, is a proper one to be used in all actions, real or personal where the defendant *may* be arrested if the plaintiff so elect—whether, in the particular case, he so elect, or intend to attach property. So whenever the defendant’s exemption from arrest is of a temporary character merely, this form of writ may be used. Thus it may issue against members of Congress, and of the legislature, parties, jurors, and witnesses attending court, although not liable to arrest for the time being, but it must be observed that while the defendant’s temporary exemption continues, the writ can only be *used* as one of *attachment*.

But where the defendant cannot by law, be arrested at all, this form of writ with the direction in it to take the body, cannot be issued,—and if so issued, whether it were in fact served as a *capias* or not, it would be abated.

Thus if it were used in suits against corporations, from the impossibility of arresting them,—or against executors and administrators, because they are not personally responsible, being also specially provided

¹ 5 Pick. Rep. 366.

for by *Stat.* 1783. *ch.* 23. *s.* 9.—or against sheriffs for the same reason, they being exempted by *Stat.* 1783. *ch.* 44. *s.* 4. from arrest, — or in debt upon judgment, where the defendant has been committed to prison upon the execution, and discharged by taking the poor debtor's oath, in all these cases it would be abated.¹

The *Stat.* 1817. *ch.* 87. giving remedies in equity, provides, that the bill in equity “may be inserted in a writ of attachment or original summons,” and such writs be served “as other writs of attachment or original summons are by law to be served.” And by *Stat.* 1823. *ch.* 140. *s.* 3. the Justices of the Supreme Judicial Court shall have authority in the cases therein provided, “to issue all such writs and processes as may be necessary or proper to carry into full effect the powers thereby granted.”

In the case *Commonwealth v. Sumner*,² the court say it is difficult to imagine why the provision in the statute of 1817, was made, unless to enable the party to obtain security by attachment at least, and if this were the intent, it is not easy to see why the alternative of holding to bail, in case there is a failure of property, should not apply in this case as well as in attachments in common law suits. Considering the obvious inapplicability of an arrest and bail upon a bill praying for a specific performance of a contract, and bills against certain species of trustees, they reserved their opinion whether the process would lie in those cases. They decided, however, that a bill in equity between partners for an account, cannot lawfully be served by arresting the defendant, and the effect of

¹ *Cooke, v. Gibbs.* 3 Mass. Rep. 193.

² 5 Pick. Rep. 360.

this decision seems to be, that all proceedings under the statute of 1823, must be by subpœna under the rules adopted by the Court.

SECT. IV. SUMMONS AND ATTACHMENT.

The form of this writ is not given by any statute. It is made by erasing the direction in the common *capias* or attachment, to take the body of the defendant, and substituting therefor a direction to summon him; in other words, it is an *original summons*, inserting therein a direction to attach the goods and estate of the defendant.

This form of summons and attachment is used in the cases before mentioned, where a *capias* is improper, and the plaintiff desires to attach property, as in actions against corporations, sheriffs, executors and administrators, and in debt on a judgment upon which execution has issued and the defendant been committed and discharged.¹ So it is presumed that this form of writ would be proper in an action before a justice, where the demand is under *ten dollars*, all persons being exempted from arrest for demands under that sum.² So in all actions against females, for the same reason.³

It might perhaps, be considered that the *capias* and attachment should issue in common form in all these cases, and the prohibition be laid on the service; but in suits against corporations, and executors and administrators, this would be an incongruity.

¹ *Cooke v. Gibbs*, 3 Mass. Rep. 193.

² Stat. 1830. ch. 131. s. 1.

³ *Ibid.* s. 2.

Except in the cases above enumerated, this writ should never be used, as it is not prescribed by statute, but allowed only from necessity. It is not unfrequently from inadvertence adopted, particularly in real actions. It is not only liable to be abated by plea or on motion, but it may be doubtful whether an appearance would make it good, and whether an attachment under it would be of any validity.¹

In an action *Goffe v. Preston and Trustee*, decided at the Court of Common Pleas for the county of Worcester, at the December term, 1824, the plaintiff had adopted the form of a writ of summons and attachment. At the March term following, a motion was made by the defendant to dismiss the action, because the process adopted was not conformable to the statute. The motion prevailed, because either of the forms of writs given in the statute might have been adopted, whereas in this case, the writ was neither a summons, or a *capias* and attachment, but a combination of both, and as this species of action was particularly excepted in the statute giving the trustee process, the case of *Cooke v. Gibbs* last cited, was a sufficient authority to shew that it was not maintainable.

In order to bring the distinctions among the four preceding forms of writs, the mode of making them, and the cases in which they are respectively proper, into a single view, it may be observed, that although a separate form of an original summons is given in the statute, yet that all four may be made from the form of a *capias* and attachment, which is the one in most common use. And

1. That if both the commands, to attach and to ar-

¹ *Cooke v. Gibbs*, 3 Mass. Rep. 193.

rest be stricken out, and the words "summon to appear" be inserted, the writ is an *original summons*.

2. That if the entire form of the writ is used, without the summons immediately following it in the statute, the writ is a *capias*.

3. That if the entire form of the writ is used together with the following summons, it is a writ of *capias and attachment*.

4. That if the form of the writ is altered by erasing merely the command to arrest, and inserting "to summon to appear," and is then used with the summons in some cases, and without it in others, which will be discriminated hereafter, the writ is a *summons and attachment*.

As to the cases in which they should respectively be used.

1. The original summons may be used in all cases whatever, but is not necessarily to be used in any case. It is the most proper form, where the plaintiff cannot or will not arrest, and does not wish to attach; and it is frequently used in real actions, where, though either an arrest or an attachment may be made, yet neither often is.

2. The *capias*, or the *capias and attachment*, should be used in all cases where the plaintiff has an election, of arresting the body or attaching property, and intends to do one or the other.

3. The summons and attachment should be used in those cases where the plaintiff cannot arrest, but desires to attach property.

So that against corporations, sheriffs, executors, administrators, and females, on demands under *ten dollars*, and in debt on a judgment upon which execution has been issued, and the defendant committed

and discharged, as an arrest cannot be made in any of these cases; an original summons *may* be used if an attachment is not intended, and a summons and attachment *must* be used if one is intended. Neither of the other two writs can, under any circumstances be resorted to, in the above cases.

In all other cases both in real and personal actions, as an arrest may be made, the plaintiff *may* use an original summons, if he intends neither to attach nor arrest; he *must* use a *capias*, if he intend to arrest the person, and a *capias* and attachment if he intend to attach the property of the defendant. In these cases a summons and attachment can never be used.

The use of the original summons being confined, as will be perceived, to cases where an attachment is not intended, the same object may be attained in all cases, by using a *capias* and attachment, or a summons and attachment, when they would respectively be proper, if an attachment were intended, and making on them a *nominal* attachment merely, as of a chip, and leaving the common summons. Thus in a real action, for example, if the plaintiff do not intend to attach or arrest, instead of an original summons, he may use the *capias* and attachment, that is, the same writ he would be obliged to use, if he really meant to attach, and by causing a nominal attachment to be made upon it, his purpose is effected. The same is true of all personal actions, where a *capias* and attachment is the proper writ.

So against corporations, sheriffs, &c. where the plaintiff does not mean to attach, a summons and attachment, with a nominal attachment, may be substituted for an original summons.

SECT. V. TRUSTEE PROCESS.

This writ is given by *Stat. 1794. ch. 65.* in cases where the plaintiff wishes to attach debts due to his debtor, or property not attachable by the ordinary process.

The form of the writ, which is also given in *sect. 1.* of the above statute, is like that of the summons and attachment, with an additional precept, to summon the person supposed to be trustee to shew cause, why the execution that shall issue upon such judgment as the plaintiff may recover in the suit, shall not be levied upon the property of the defendant, in the possession of the supposed trustee.

In what actions may be used.—It is only in *personal* actions, that this writ is given by the above statute and of these “*detinue, replevin, case for slanderous words or malicious prosecutions, and actions of trespass for assault and battery,*” are excepted.¹

The *Stat. 1794.* confined the use of this writ to *personal* actions, as above, commenced in the Court of Common Pleas. But now by *Stat. 1833. ch. 171.* a trustee writ may also be issued from the Supreme Judicial Court, in all cases, where an original writ would lie to that court. And in such case, the writ may be issued under the seal, and signed by the clerk of the Supreme Judicial Court,

A trustee writ cannot be issued by a justice of the peace, or from a justices’ court, it not being authorized by any statute.

Against what principal defendant. This writ may

¹ *Stat. 1794. ch. 65. s. 1.*

be used, in personal actions as above, against any person or persons, "other than bodies politic or corporate."¹ A corporation, therefore, never can be the principal defendant in a trustee process.

Against what persons as trustees. It was formerly holden that *individuals* only could be summoned as trustees.² But now, by *Stat. 1823. ch. 164. corporations* are made liable to be summoned as trustees, and the provisions of *Stat. 1794. ch. 65.* are extended to them.

A person not an inhabitant of the state, though summoned as trustee while within the Commonwealth, cannot be held to answer as trustee.³

How defendant's property must be situated. Under this head, we shall consider only the cases, where from the situation of the defendant's property, this writ, and not the common writ of attachment, is most proper.

The statute gives this proceeding where goods, effects or credits are so entrusted and deposited in the hands of the trustees "that the same cannot be attached by the ordinary process of law." The trustee writ, therefore, is not the proper remedy when the goods and effects of the defendant, in the possession of another person may be attached by the ordinary process.³ But if the person entrusted with them has locked them up and detains the key, or claims a right to retain them, by virtue of a supposed lien, and does

¹ Stat. 1794. ch. 65. s. 1.

² *Union Turnpike v. Jenkins & Tr.* 2 Mass. Rep. 37.

³ *Tingley v. Bateman & Tr.* 10 Mass. Rep. 343. *Ray & al. v. Underwood & Tr.* 3 Pick. Rep. 302.

³ *Allen v. Megguire & Tr.* 15 Mass. Rep. 490.

not expose them to attachment, they may be attached by this process.¹

This statute has received a very liberal construction by our courts in this respect. Goods and effects of a debtor may be physically within the reach of an officer to attach, yet the creditor may avoid by the trustee process, many difficulties which might occur by recourse to the common form of *capias* and attachment. Thus if the trustee claims to have a lien upon the property or to hold it as a pledge,—or where goods have been consigned to and received by the trustee to sell as a factor :²—or if they were fraudulently transferred to defeat or delay creditors,—though the goods are not concealed in any of these cases, and might be attached, yet a trustee process will lie ;—and it seems to be peculiarly proper in the instance last mentioned, because it is only by this method of proceeding, that the fraudulent holder of the goods can be put upon his oath and be compelled to submit to an examination.³ So if a person remove the goods to his house and claim to hold them as a pledge, they will be liable to attachment in his hands by this process, though they might have been attached under the ordinary process.⁴ And in general, it is not necessary that the goods should have come into the hands of the trustee by any contract with, or even by the authority or consent of the debtor, to render the goods liable to be attached in his hands, under this process ;—it is sufficient, if the trustee pretend to

¹ Ibid.—*Parker v. Kinsman & Tr.* 8 Mass. Rep. 486.

² *Grant et al. v. Shaw*, 16 Mass. Rep. 341.

³ *Burlingame v. Bell*, 16 Mass. Rep. 318.—*Thomas v. Goodwin & Tr.* 12 Mass. Rep. 140.—*Swett et al. v. Brown & Tr.* 5 Pick. Rep. 178.

⁴ *Swett et al. v. Brown & Tr.* 5 Pick. Rep. 178.

hold them under any claim, against the rights of an attaching creditor.¹

But the trustee must have the actual possession or control of the property, so that he may be able to turn it out on execution,—or he cannot be charged on account of it. Therefore, one to whom property is assigned, of which he has only the constructive possession, as in case of a ship and cargo at sea, is not liable as trustee under this process.²

Where personal property, exempt by law from attachment, has been mortgaged or pledged, or is subject to any lien created by law, it is now provided by statute,³ that the mortgagee, pledgee, or holder, may be summoned as the trustee of the mortgagor, pledgor, or general owner, and upon being paid or tendered the amount of his claim, shall give up the property to the attaching officer,—or that the property may be attached by the ordinary process, upon payment or tender to the mortgagee, pledgee, or holder, of the amount for which it is mortgaged or pledged to, or holden by him.

Where *lands* have been fraudulently conveyed, the trustee process is not the proper form of remedy, as the grantee is not, by the terms of the statute, chargeable by reason of land of the debtor, in his possession:⁴—the proper course of proceeding, in such case would be, to attach the land as the property of the fraudulent debtor. But if one to whom real estate has been conveyed by his debtor, as security for his debt, sells the

¹ *Swett et al. v. Brown and Tr.* 5 Pick. Rep. 178.

² *Andrews v. Ludlow & Tr.* 5 Pick. Rep. 28.

³ Stat. 1829. ch. 124.

⁴ *How et al. v. Field & Tr.* 5 Mass. Rep. 390.

same, he is liable, as trustee of the debtor for the surplus.¹

The *Stat.* 1794. *ch.* 65. provides in *sect.* 4. that if the trustees shall all be discharged or the plaintiff shall discontinue as to them, he may still proceed against the principal, to which is added by *Stat.* 1798. *ch.* 5. *s.* 1. the proviso,—if such service of the original writ have been made on him, as would have authorized the court to render judgment against him, in an action brought in the common mode of process.² Whether this form of writ, can be used, without any trustees named in it, but served on the defendant in the same manner as if there were, is not settled. In *Badlam v. Tucker et al.*³ where this form had been resorted to by a plaintiff, but no name of any person inserted as trustee, and the officer attached property, the court held that the writ was not void, and that the judgment therein was valid by virtue of *Stat.* 1794. *ch.* 65. The question in that case, however, was not between the attaching creditor and the debtor, but the objection was made by a person claiming as purchaser, and the case does not decide, whether the objection would not be good, if taken on plea in abatement by the defendant.

SECT. VI. REVIEW.

None of the statutes authorizing reviews have prescribed the form of the writ. The courts, therefore,

¹ *Pierson v. Weller*, 3 Mass. Rep. 564. *Webb v. Peele*, 7 Pick. Rep. 247.

² Vide. *Gardner v. Barker & Tr.* 12 Mass. Rep. 36. *Jacobs et al. v. Mel- len & Tr.* 14 Mass. Rep. 132. *Bullard v. Brackett*, 2 Pick. Rep. 85.

³ 1 Pick. Rep. 389.

according to their "ancient and constant practice," as stated by Parsons, C. J. in *Cooke v. Gibbs*,¹ have granted a writ by which parties may obtain the remedy given them by the statutes.

Accordingly a writ of review will be issued by the clerk, either of the Supreme Judicial Court or the Court of Common Pleas, upon application. In form it is an original summons, commanding the officer to summon the defendant in review, to appear and answer to the plaintiff in review, in a plea of review of a plea of the case &c.

The subject of review will be treated of in a subsequent chapter. It is mentioned in this connexion only as the writ of review is one of the writs in use in our practice.

SECT. VII. SCIRE FACIAS.

A *scire facias* is a judicial writ founded on some matter of record, as a recognizance, judgment, &c. requiring the person against whom it is brought to shew cause why the party bringing it, should not have the benefit of such record. But though a *scire facias* is a judicial writ, yet it is so far considered as an action, that a release of all actions is a bar to a *scire facias*.²

Form. Though there are several cases in which the writ of *scire facias* may be used, there is but one of them, namely, on a judgment, for which the form of the writ has been prescribed by statute. The form for this case is given in *Stat. 1784. ch. 28. s. 2.* But not-

¹ 3 Mass. Rep. 193.

² Co Litt. 290. b. *Treviban v. Lawrence*, 2 Ld. Ray. Rep. 1048. *Grey v. Jones*, 2 Wils. Rep. 251.

withstanding this, the court will allow the form given to be so altered, as to suit all the cases in which the writ may be used.¹

The writ in all cases is substantially an original summons, commanding the officer to “*make known*” to the defendant to appear and shew cause &c.

There are several cases in which this writ may be resorted to, which will be enumerated.

1. *On judgments.* A *scire facias* on a judgment is brought either by or against the same, or different parties. Where a year has elapsed after the rendition of judgment, and no execution has been issued, or after an execution so issued has been returned unsatisfied, the law presumes that the judgment has been executed, or that the plaintiff has released the execution; and therefore it is, that a *scire facias* is required in such a case, in order to give an opportunity to the defendant to shew that the judgment has been already executed, or other cause, if he can, why execution should not issue against him.²

Before the statute of *West. 2*, the only remedy for a party in a personal action, who had suffered a year to elapse without suing out execution on his judgment, was by an action of debt. By that statute, a writ of *scire facias* was given to avoid the delay to which an original action was exposed; but the former remedy was not taken away; and as an action of debt is not subject to any more delay here than a *scire facias*, the former would seem to be the more appropriate remedy, especially as interest is recoverable in this form.³

¹ *Cooke v. Gibbs*, 3 Mass. Rep. 193.

² 2 Saund. Rep. 72. *d.*

³ 2 Inst. 469. 470. 1 Sid. 351. *Commonwealth v. Green*, 12 Mass. Rep. 1.

By *Stat. 1783. ch. 57. s. 1.* it is provided that the party obtaining judgment shall be entitled to his execution within one year, but after that, he shall sue out his *scire facias*.

If after judgment has been revived by a *scire facias*, the plaintiff do not take out execution within a year, or if the defendant die, the judgment must be again renewed by a new *scire facias*, or action on the judgment.¹

If a plaintiff sue out his *scire facias* within the year, he cannot afterwards have execution until he has a new judgment on the *scire facias*.²

A *scire facias*, however, is not necessary, in a case where judgment is rendered with a *cessat executio*, until a year has elapsed after the *cessat* is determined.³

So if bail surrender their principal on *scire facias* and he is committed, the plaintiff is entitled to an *alias* execution, though more than a year have elapsed since the return of the former execution.⁴

So in England, if the plaintiff has been prevented from suing out execution by a writ of error brought by the defendant.⁵

2. *When real estate not the property of the debtor has been levied on.* By *Stat. 1785. ch. 6.* it is provided, that in cases where an execution has been levied upon real estate, which did not, at the time of the levy, belong to the debtor, the court from whence such execution issued, upon application of the creditor, may order a writ of *scire facias* to issue against such debtor.

¹ *Hardisty v. Barny*, 2 Salk. 598.

² Rol. Abr. 900. Tidd's Pract. 1027.

³ *Booth v. Booth*, 6 Mod. Rep. 288. 1 Salk. 322. S. C.

⁴ *Bartlett v. Falley*, 5 Mass. Rep. 373.

⁵ 2 Inst. 471. 5. Co. 88. Cro. E. 416.

At common law, the only remedy in such case, was by an action of debt. And the remedy by *scire facias* given by the statute, is cumulative, for debt on the judgment may still be brought in such a case, and if the levy be pleaded in bar, the plaintiff may reply that the land extended upon was not the estate of the debtor.¹

The *scire facias* given by *Stat. 1785. ch. 6.* is not a writ of right, but the party must make application for it to the court, as the statute has prescribed; and the court will, if they see cause, order notice to the judgment debtor, before the writ shall issue; or they will refuse the writ, if it do not appear that substantial justice requires that it should issue.²

3. *Upon the death of parties.* If the plaintiff or defendant die after judgment, his executor or administrator must sue out a *scire facias* before he can have execution: for in general, where a new person is to be benefitted, or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party to it.³

Where there is only one plaintiff or defendant who dies after judgment and before execution, a *scire facias* may be had by or against his personal representatives. But where there are several plaintiffs or defendants, and one of them dies, execution may be had by or against the survivors without a *scire facias*. The execution should in such case issue in the name of all the parties on the record so as to follow the judgment.⁴

At common law, an administrator *de bonis non*

¹ *Gooch v. Atkins*, 14 Mass. Rep. 378. *Greene v. Hatch*, 12 Mass. Rep. 195.

² *Kendrick v. Wentworth*, 14 Mass. Rep. 57.

³ *Penoyer v. Brace*, 1 Ld. Ray. Rep. 245. 1 Salk. 319. S. C.

⁴ *Ibid.* 7 Mod. Rep. 68. Bac. Abr. *Scire facias* C. 4.

could not have a *scire facias* on a judgment obtained by the first executor or administrator, for a debt due to the testator or intestate, but was compelled to bring a new action : and the former judgment was no bar to such new action because it had become ineffectual for want of privity between the original executor or administrator, and the administrator *de bonis non*.¹

But now by *Stat. 17. Car. 2.* in England, and here by *Stat. 1817. ch. 190. s. 18.* an administrator *de bonis non* may not only become a party to a suit pending at the time of the death or removal of the original executor or administrator, but may also sue out a *scire facias* upon a judgment recovered by such executor or administrator. And by the same statute, if a judgment be recovered *against* an executor or administrator, a *scire facias* lies *against* the administrator *de bonis non*, of the testator.²

In like manner if a judgment be recovered by or against an executor or administrator *durante minority*, a *scire facias* may be brought on such judgment by or against the infant executor upon his coming of age.³ So an executor may sue a *scire facias*, on a judgment recovered by an administrator *pendente lite*;⁴ for in these cases there is a sufficient privity.

4. *Upon the marriage of a feme plaintiff or defendant.* If a feme sole plaintiff or defendant marry, after judgment and before execution, there must be a *scire facias* to execute the judgment.⁵ The husband

¹ Yelv. 33, 83. Latch. 140. Sty. 52. *Grout v. Chamberlin*, 4 Mass Rep. 611, 613.

² Wm. Jones, 214. Cro. Car. 167.

³ 1 Rol. Abr. 888. Yelv. 33. Ow. 134. *Sparkes v. Craft*, 1 Ld. Ray. Rep. 265.

⁴ *Walker v. Woolaston*, 2 P. W. 587.

⁵ 2 Saund. 72. k.

cannot have execution for the costs, on a plea of coverture found for his wife sued as a feme sole, without a *scire facias*.¹

If a feme sole defendant marry, it seems that a *scire facias* is unnecessary, unless the plaintiff wishes execution against the husband as well as the wife.²

5. *On a judgment in debt on bond.* In debt on bond or other instrument in a penal sum, conditioned for the performance of covenants, or for the doing of any specific act, although the judgment is entered up for the entire penalty, yet execution is sued out for such damages only as the jury shall assess upon the breaches assigned. The judgment, however, still remains as a security to the plaintiff for such damages as he shall sustain by any further breaches, and he may have a *scire facias* to recover them.³

A *scire facias* does not lie upon an order of the Court of Common Pleas assessing the putative father for the maintenance of a bastard child.⁴

6. *On Recognizances.* A *scire facias* lies on all recognizances, whether to the Commonwealth or to individuals, and whether absolute or conditional.⁵

Upon a recognizance, a *scire facias* is an original proceeding, but upon a judgment it is only a continuance of the former suit.⁶

A recognizance is an obligation of record, which a man enters into before some court of record, or mag-

¹ *Wootley v. Rayner*, Dougl. Rep. 637.

² *Cooper v. Hunchin*, 4 East. Rep. 521.

³ Stat. 1798. ch. 77. s. 6. 1 Saund. 58. 2 Saund. 72. g. 187. b.

⁴ *Woodcock v. Walker*, 14 Mass. Rep. 386.

⁵ *Commonwealth v. Green*, 12 Mass. Rep. 1.

⁶ *Executors of Wright v. Nutt*. 1 Term. Rep. 388.

istrate duly authorized, with a condition to do, or forbear to do, some particular act.

Recognizances are of two kinds; those entered into in the course of judicial proceedings, as to prosecute an appeal—to appear and answer to an indictment—or to appear as a witness: and those for the payment of money merely, by virtue of *Stat.* 1782. *ch.* 21.

Recognizances of the first description are not complete until they are enrolled in some court of record.¹ The latter are bonds acknowledged before some justice of the peace, who enters the same of record, and delivers the original to the conusee. Upon a recognizance thus entered into, the justice before whom it is acknowledged, is authorized upon the production and filing of the original recognizance, to issue execution against the conusor in the same manner, as an execution might issue against him on a judgment in a court of record, and this execution may be issued at any time within three years after the recognizance is entered into. The statute points out the manner in which the *scire facias* is to be sued out.

In all these cases, debt is a concurrent remedy, and is usually preferable.

7. *Against bail.* A writ of *scire facias* against bail is given by *Stat.* 1784. *ch.* 10. This will be considered hereafter.

8. *Against Trustees.* By *Stat.* 1794. *ch.* 65. *s.* 6. the plaintiff in a trustee process, after judgment against the principal and his goods and effects in the hands of trustees and a demand on execution, may have a *scire facias* against the trustee.

And *scire facias* lies against the trustee, notwith-

¹ F. N. B. 207. *Bridge v. Ford*, 7 Mass. Rep. 209. *Same v. Same*, 4 Mass. Rep. 641.

standing the death of the principal unless the estate have been represented insolvent.¹

But it does not lie in any case until execution against the principal has issued and been returned unsatisfied.²

If several persons are cited and charged as trustees, the plaintiff may, on a return of the execution unsatisfied, sue out a *scire facias* against all the trustees so charged, either jointly or severally. If, however, the trustees, or any certain number of them, if liable at all, are liable jointly, there would be an obvious convenience and propriety in joining all, or so many as are jointly liable, in one writ.³

9. *Against Indorsers of Writs.* *Scire facias* is also, the proper remedy under the *Stat. 1784, ch. 28. s. 11*, against the indorser of writs, in case of the avoidance or inability of the plaintiff, to pay the defendant all such costs as he shall recover, and to pay all prison charges that may happen, where the plaintiff shall not support his action.⁴ The same remedy is proper under the recent statute, regulating the indorsement of writs.⁵

10. *Against executors and administrators.* By *Stat. 1783. ch. 32. s. 9*. It is provided, that upon suggestion of waste, founded on a return made by the sheriff, upon execution against the estate of the deceased, that he could not find any goods or estate of the testator or intestate, a *scire facias* shall issue against the executor or administrator.⁶

¹ *Patterson et al. v. Patten Exor.* 15 Mass. Rep. 473.

² *Ibid.* *Same v. Buckminster and Tr.* 14 Mass. Rep. 144.

³ *Stat. 1794. ch. 65. s. 6.* *Hathaway v. Russell*, 16. Mass. Rep. 473.

⁴ *Miller v. Washburn*, 11 Mass. Rep. 411.

⁵ *Stat. 1833, ch. 50.* See further upon this subject *supra* Chap. VIII. Sect. VI.

⁶ *Vide also, Stat. 1783. ch. 42. s. 4. Stat. 1819. ch. 157.*

11. *By one justice of the peace, upon a judgment rendered by a deceased justice.* By Stat. 1783. ch. 42. s. 3. any justice of the peace, in the same county, may grant a *scire facias* upon any judgment rendered by a justice of the peace, who dies before a satisfaction of the judgment.

12. *Proceedings in scire facias.* In *scire facias* upon judgments, including proceedings against trustees who have been charged upon their answers and against executors for waste, the process is but a continuation of the former suit. But against bail, indorsers, or recognizances, *scire facias* is an original proceeding.¹

In *Clarke v. Paine*,² it seemed to be considered that *scire facias* against an indorser was an original writ within the meaning of the statute requiring such writs to be indorsed. It is now required to be indorsed by the late Stat. 1833. ch. 50. s. 2. regulating this subject.

The same rules are to be generally observed in relation to the joinder of parties in actions of *scire facias*, which govern in other suits.³

In a declaration upon a recognizance there ought to be a recital of the condition on which it was given, for no debt is due until the condition is broken, it being in this respect unlike a bond *in pais* upon condition. And in case of a recognizance to the commonwealth, it is indispensable that the breach of the condition should be a matter of record, though in case of a recognizance to an individual the rule may be different.⁴

A recognizance should recite the cause of its cap-

¹ *Wright's Exors. v. Nutt.* 1 Term Rep. 388.

² 11 Pick. Rep. 66.

³ 2 Anst. 448.

⁴ *Bridge v. Ford.* 4. Mass. Rep. 643.

tion.¹ As if it be for the appearance of the conusor to answer charges against him, it ought to show the cause of taking it.² And in the condition of a recognizance taken by a justice of the peace, to prosecute an appeal, the justice ought to recite so much of the judgment as to make it appear, that he had cognizance of the suit, for being a court of inferior jurisdiction nothing is to be presumed in its favor.

The justice ought, also, to transmit the recognizance to the court appealed to, that it may be entered of record, for it must appear to have been enrolled in some court of record.

The *scire facias* upon a judgment must be sued out of the same court, where judgment was given, if the record remains there ; or, if it has been removed, then out of the court where the record is.³

The defendant may plead to a *scire facias* on judgment, *nul tiel record*, payment, release, or that the execution was levied on his lands, goods or person.⁴ But the defendant cannot plead any matter to a *scire facias* on a judgment, which he might have pleaded in the original action,⁵ or to a second *scire facias* what might have been pleaded to the first.⁶

No damages are recoverable in a *scire facias* for a delay of the action : nor can the debt be secured by attachment, bail, or otherwise, which renders debt more expedient in all cases where it may be brought.⁷

¹ *Commonwealth v. Downey*, 9 Mass. Rep. 520.

² *Commonwealth v. Daggett*, 16 Mass. Rep. 447.

³ *Commonwealth v. Downey*, 9 Mass. Rep. 520.

⁴ 3 Leon. 270. 4 Leon. 194. Cro. C. 328. Dyer, 299.

⁵ *Allen v. Andrews*, Cro. E. 283. *Middleton v. Hall*, Cro. E. 588.—*Cooke v. Jones*. Cowp. Rep. 727. *Wilcox v. Mills*, 4 Mass. Rep. 218, 507.

⁶ F. N. B. 104, *Cooke v. Berry*. 1 Wils. Rep. 98.

⁷ *Knox v. Costello*, 3 Burr. Rep. 1791.

SECT. VIII. WRIT OF DOWER.

The form of the *Writ of Dower*, is given by *Stat. 1783 ch. 40.* and varies slightly from the form of the original summons. The statute is explicit, that it shall be in the form there given, which seems to have been left unaltered by the subsequent statute. The demandant in dower has, therefore, the peculiar disadvantage of not being able to secure payment of costs by an attachment. This distinction, though probably accidental, it is necessary to observe. It is frequently overlooked, and we meet with actions of dower commenced by *capias* and attachment.

SECT. IX. REPLEVIN.

Forms. The *Stat. 1789. ch. 26.* gives the forms of this writ. The *first section* of the statute provides one form. Where cattle have been distrained while going at large or damage feasant, &c. The *fourth section* of the same statute provides, “that when any goods or chattels shall be taken, distrained or attached, which shall be claimed by a third person, and the person thus claiming them shall think proper to replevy them, in case such goods and chattels are of the value of more than four pounds, (now by *Stat. 1807. ch. 123. twenty dollars,*) he may take out and prosecute his writ of replevin from the clerk’s office, of the Court of Common Pleas, in the county where the goods and chattels are thus taken, in the form prescribed in the same section.

Bond. In both the above cases it is made necessary by a *proviso*, inserted in both forms of the writ, that

the plaintiff in replevin, give to the defendant a bond with sufficient surety or sureties in a sum equal to twice the value of the beasts, or the goods replevied, to prosecute his suit to judgment ; to pay the damages and costs that may be recovered against him, and also, to restore the property replevied in case such be the judgment.

This bond must be taken in all cases, or the process may be avoided by the defendant, by plea in abatement or on motion.¹ And it must be given to the defendant, and not to the officer serving the writ, or it will be illegal and void.² But it has been decided, that though the bond taken be for a larger sum, than the precept requires ;³ or though signed by a part only of several plaintiffs ;⁴ or though bearing date after the service of the writ ;⁵ or though not following *verbatim* in the condition, the words of the statute,⁶ the service will be good.

Cases, where proper. The statute gives this form of proceeding to any person, who has a general or special property in the goods, and the right to their immediate possession, and against any person whose possession is unlawful, unless the goods are in the custody of the law, or unless they have been before replevied by the party in possession.⁷

¹ *Cady v. Eggleston, et al.* 11 Mass. Rep. 282.

² *Purple v. Purple, et al.* 5 Pick. Rep. 226.

³ *Clap v. Guild*, 8 Mass. Rep. 153.

⁴ *Chandler et al. v. Smith*, 14 Mass. Rep. 313.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Waterman v. Robinson*, 5 Mass. Rep. 303. *Ludden v. Leavitt*, 9 Mass. Rep. 104. *Ladd v. Billings*, 15 Mass. Rep. 15. *Ilseley et al. v. Stubbs*, 5 Mass. Rep. 280. *Portland Bank v. Stubbs et al.* 6 Mass. Rep. 422. *Gates v. Gates*, 15 Mass. Rep. 310. *Badger v. Phinney*, *Ib.* 359. *Walcott et al. v. Pomeroy et al.* 2 Pick. Rep. 121. *Wheeler v. Train*, 3 Pick. Rep. 255 4 *Ib.* 168.

By *Stat.* 1822. *ch.* 110. *s.* 1. suits in replevin survive to; and against the executors or administrators of either party.

At common law the action of replevin did not lie, unless there had been a tortious taking, or some act by which the possession of the goods made the party a trespasser *ab initio*, and in the case of *Meany v. Head*,¹ it was held, that the *Stat.* of 1789. *ch.* 26. had not in this respect varied the principles by which the action should be governed. It is, however, well settled in our courts, that the action will lie for goods, which are unlawfully detained though the taking were lawful.²

A writ of replevin is sued out and indorsed in the same manner as other original writs.

It may be here remarked, that the writ of replevin affords the only method in our practice by which a party can under process of law receive back, *in specie*, the property demanded.³ If the property demanded be owned by several in common, one part owner cannot maintain replevin for it, and the plaintiff must resort to another form of action; all the part owners must join in replevin, and if they do not the court will *ex officio* abate the writ.⁴

SECT. X. DE HOMINE REPLEGIANDO.

The forms of this writ are prescribed by the *Stat.* 1786. *ch.* 58. By this writ, “every person within this

¹ 1 Mason, Rep. 319.

² *Buffington et al. v. Gerrish et al.* 15 Mass. Rep. 156. *Badger v. Phinney*, *Ib.* 359. *Marston v. Baldwin*, 17 Mass. Rep. 606. *Baker et al. v. Fales* 16 Mass. Rep. 147. *Hussey et al. v. Thornton*, 4 Mass. Rep. 405.

³ *Gould v. Barnard*, 3 Mass. Rep. 199.

⁴ *Hart v. Fitzgerald*, 2 Mass. Rep. 509. *Portland Bank v. Stubbs et al.* 6 Mass. Rep. 422. *Gardner v. Dutch*, 9 Mass. Rep. 427. *Page v. Weeks*, 13 Mass. Rep. 199. *Ladd v. Billings*, 15 Mass. Rep. 15.

commonwealth, who shall be imprisoned, confined, or held in duress, shall be entitled, as of right, to the writ *de homine replegiando*, and to be thereby delivered; unless, while the writ of *habeas corpus* is suspended by the legislature, he shall stand committed by the special order of the supreme executive power of the state, as dangerous to the public safety; or by the same, or by some subordinate authority of the government, for treason, the death of man, counterfeiting the common currency, house burning, burglary, robbery, or some other offence, for which, if he is convicted, he may suffer death, or banishment; or unless, he is held in execution upon judgment of debt, forfeiture, withernam, or by distress for taxes, or under sentence after conviction, for fine, costs, or in punishment."

Forms. The Statute, (*sec. 1.*) prescribes two distinct forms of writ; one for the case "where any person stands committed by *lawful authority* for any crime for which he may not suffer death or otherwise, than is above in this act specified;" and the other "where the plaintiff is held *without order of law.*"

From what courts the writ issues. In the first case, and by *sect. 2*, in all cases, except the last, the writ issues from the *Supreme Judicial Court*, and must be made returnable at the next term thereof, holden in the county, where the plaintiff is in custody, having been served fourteen days at least, before the return day. In the last case only, where the plaintiff is held, without order of law, the writ issues from the *Court of Common Pleas*, and must be served and made returnable in the like manner.

Under this provision, it has been decided, that wherever the commitment is by lawful authority, though exercised in an unlawful manner, the person aggrieved must sue out his writ, returnable to the

Supreme Judicial Court. And whenever it arises from an unlawful restraint, to the Court of Common Pleas.¹

This form of proceeding is very rarely resorted to in practice, and the course prescribed by the statute is perfectly plain and intelligible.

Recognizance bond. Where the plaintiff is delivered by this writ, returnable to the Supreme Judicial Court, before he is delivered, he shall recognize before the sheriff of the county in person, with sufficient surety or sureties in a reasonable sum, for his appearance at the same court to answer, abide and perform the order and sentence of the same ; which recognizance shall be returned into court by the sheriff. And when the plaintiff shall be delivered by the writ, returnable into the Court of Common Pleas, he shall before his deliverance, give a bond to the use of the defendant, with sufficient surety or sureties, at the discretion of the sheriff, to appear at the court to which the writ is returnable, and there to prosecute his replevin against the defendant, to have his body there ready to be re-delivered, as the court shall order, and to pay all damages and costs that may be awarded against him ; and the sheriff shall be answerable, if the sureties prove insufficient, unless they are such as the defendant agrees to. If the plaintiff do not prosecute or is unable to sustain his writ, then the defendant shall recover his costs ; and if it is found on trial that the plaintiff is the ward or infant of the defendant, or that the defendant is entitled to the service of the plaintiff, or is bail to the plaintiff, then the defendant shall have judgment against the plaintiff for a re-delivery of his body, and for such damages as the jury

¹ *Williams v. Blunt*, 2 Mass. Rep. 207.

shall assess against the plaintiff, with reasonable costs.

By the *fourth* section of the statute, it is provided, that if the sheriff shall return upon the writ, *de homine replegiando*, issuing from the Court of Common Pleas, that the defendant hath claimed the plaintiff's body, so that he cannot deliver him, the plaintiff, on motion to the court, shall have a writ of *capias in withernam* against the defendant, to take the body of the defendant, and to keep him in the custody of the sheriff until he shall produce the plaintiff according to the commandment of the original writ. *Provided* however, if the defendant will give sufficient bail to the sheriff for his appearance at the court to which the writ is returnable, then and there to traverse the sheriff's return upon the writ *de homine replegiando*, that the sheriff shall take such bail: or if he cannot give full and sufficient bail, and is thereupon committed by the sheriff, he may at the next term of the court and not afterwards, traverse the sheriff's return, or plead any matter in justification, in the same manner he might have done to the original replevin. If the jury find that he is not guilty of eloigning the plaintiff, as set forth in the return, or if they find that his plea of justification is supported, he will be discharged and costs allowed him against the plaintiff, but if the defendant will not traverse the return or plead in justification, or if he cannot support his traverse or plea, then the court will order him into the custody of the sheriff, and will issue an *alias* writ of *withernam* to hold him, until he shall produce the body of the plaintiff, or until he can prove that the plaintiff is dead, which fact may be tried at any term of the same court,

and in the same county by a jury, upon the information and at the expense of the defendant.

The form of the writ of *capias in withernam* is prescribed in the same statute.

By the *sixth* section it is provided, that in any stage of the proceedings upon process pursuant to this act, any person shall be permitted to appear for the plaintiff, who will stipulate, as the court shall direct, for the payment of all costs and damages that may be awarded against the plaintiff, although he can produce no special power for that purpose.

SECT. XI. AUDITA QUERELA.

An *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting them aside for some injustice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded, it was the party's own fault, not to have so done, and therefore, in such case he shall not be relieved, that proceedings may not be endless.¹ Thus, where after a judgment, a release is given, and yet execution is taken out,—or where a man satisfies a judgment, and afterwards is taken in execution, or in general, where legal process is abused and injuriously employed to effect the purposes of fraud or oppression, this writ may be used.²

This writ is now seldom resorted to, as the indulg-

¹ Bac. Abr. Tit. Audita Querela. 2 Sell. Pract. 253. 2 Saund, 148. a.

² *Lovejoy v. Webber*, 10 Mass. Rep. 101. *Little v. Newburyport Bank*, 14 Mass. Rep. 443. *Brackett v. Winslow et al.* 17 Mass. Rep. 153.

ence of the courts will generally grant more summary relief upon motion.¹

Forms. The *Stat.* 1780. *ch.* 47. prescribes two forms of this writ, one in *sect.* 7, as an *original summons*, and the other in *sect.* 4, with a few verbal differences merely, as a *capias and attachment*. And the plaintiff may use either at his election, that is, he may either summon the defendant, or arrest his body, or attach his property. And by *sect.* 5, if he take the body, the defendant may give bail, and if he attach property, it will be holden to satisfy the execution, in the same manner as under the ordinary *capias* and *capias and attachment*.

From what Courts the writ issues. By *sect.* 1, of this statute, it is provided that when this writ is brought to set aside or annul any proceedings had upon a writ of execution, it shall issue from and be returnable to the court, to which the said execution is returnable, but in all other cases, it shall issue from and be returnable to the Court of Common Pleas, in the county where one of the parties is an inhabitant or resident, and when the complainant is not an inhabitant of the commonwealth in any county.

SECT. XII. EJECTMENT BY LANDLORD AGAINST TENANT.

By *Stat.* 1825. *ch.* 89. “providing further remedies for landlords and tenants,” it is enacted that “where the tenant or occupant of any house or tenement, shall hold such house or tenement without right and after no-

¹ 2 Sell. Prac. 253. 1 Arch. Prac. 201.

tice in writing to quit the same; whosoever has the right of possession thereof, may summon such tenant or occupant to answer to his complaint before the Justices' Court of the county of Suffolk, if such house or tenement be within the county of Suffolk, and before any justice of the peace for any other county wherein such house or tenement may be."

The form of the summons is given by the same statute. This summons must be served in the same manner as any original summons, returnable before a justice of the peace. If the judgment be for the complainant, either by default or after trial, he shall have a writ of *facias habere possessionem*, and his costs; but if he fail to sustain his complaint, the defendant shall have judgment for his costs.

An appeal lies from the judgment, to the next Court of Common Pleas, holden in the same county, in the same manner as in other cases tried before justices of the peace.

This statute was apparently intended to give a plain mode of relief, by which tenancies at will and at sufferance might be determined, and the possession of the estate restored to the owner. It evidently includes by the terms "tenant or occupant without right," all the cases provided for by the *Stat. 1784. ch. 8.* mentioned in a subsequent section,¹ where the unlawful possession is of a house or tenement, and in these cases the remedy for the owner under the statute of 1825, is more simple, and less expensive.

¹ Sect. XIV. *post.*

SECT. XIII. HABEAS CORPUS.

The constitution of Massachusetts provides¹ “that the privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.”

Persons entitled. By *Stat. 1784. ch. 72.* any person imprisoned in any common gaol, or otherwise restrained of his personal liberty, by any officer or by any other person, for any cause or upon any pretence whatever, except he be committed for treason or felony, or for suspicion thereof, or as accessory to the latter before the fact, plainly and specially expressed in the warrant of commitment, or be convicted or in execution by legal process, criminal or civil, or be committed on mesne process in any civil action for want of reasonable bail, or unless he be a person with regard to whom the benefit of the writ has been suspended by the legislature, agreeable to the constitution, is entitled to a writ of *habeas corpus*.

By *Stat. 1814. ch. 136.* if any minor within this commonwealth enlist in the army of the United States, without the written consent of his parent, guardian and master, either of the justices of the Supreme Judicial Court, or of the Court of Common Pleas, are authorized and required on application therefor, to award a writ of *habeas corpus* returnable forthwith, directed to the officer or person restraining such minor, and

¹ Chap. VI. Art. 7.

after a full hearing of the parties who shall appear, to discharge such minor so enlisted.

Mode of proceeding. The person confined or some person in his behalf must complain in writing to the Supreme Judicial Court, in any county or to any single judge thereof,¹ in term time, or to any one or more of the judges thereof in vacation, and upon such complaint, and upon view of the copy of the warrant, if any there be, by which such person stands committed, or upon his affidavit certified by a justice of the peace, or on the oath of the person applying in his behalf, or any other credible witness, or upon the affidavit of such witness certified as aforesaid, if he lives more than twenty miles from the court or judge applied to, that a copy of such warrant has been demanded and denied, the said court or single judge thereof,² in term time, and the said judge in vacation, are respectively authorized and required to award a writ of *habeas corpus*, directed to the officer or person imprisoning or restraining the complainant, returnable forthwith to such court or judge who awarded the same.

Form. The *second* section of the statute prescribes the form of the writ, and directs, that when awarded by the said court, the writ shall be signed by the clerk, tested by the first justice who is not party thereto, and sealed with the seal thereof; but that when awarded by any judge in vacation, it shall only be under the hand and seal of such judge, and shall direct the place to which the complainant shall be brought.

Service and return. No special service of the writ is required to be made by any officer, but by the

¹ Stat. 1808. ch. 80.

² Ibid.

third section of the foregoing statute it is provided, that when any person shall bring and offer a writ of *habeas corpus* to the officer or person, to whom the same shall be directed, he shall receive the same; and upon payment or tender of such charges for bringing the complainant from the place of imprisonment, as the court or judge who grants the writ shall order, if the person complaining be confined in a common gaol, or under the custody of an officer, otherwise without such payment or tender, to the place mentioned in the writ, such officer or person shall have the body of the complainant before the court or judge awarding the writ at the place therein mentioned, within three days, if within twenty miles from the place of imprisonment; if more than twenty but within one hundred miles, then within ten days; if above one hundred miles, then within twenty days after the receipt thereof; and shall then return the same, and certify therein the true, and all the cause or causes, of the taking and detaining.

The court or judge are then directed by the *fifth* section of the statute, within three days after the person is brought before them, to proceed to examine the causes of the detention, and to admit him to bail or discharge him, according to the circumstances of the case.

SECT. XIV. SUMMONS IN PROCESS AGAINST FORCIBLE ENTRY AND DETAINER.

The form of the writ and the proceedings against *forcible entry and detainer* are regulated by *Stat. 1784. ch. 8.*

The cases to which the proceedings are applicable, are where one makes an unlawful and forcible entry into lands or tenements, or having a lawful and peaceable entry, unlawfully and with force detains the same.

In either of the above cases, the *second* section of the statute provides that the party aggrieved shall file his complaint, setting forth the facts, before any two Justices of the Peace, *quorum unus*, who thereupon shall issue a warrant to the sheriff of the same county, commanding him “in the behalf of the commonwealth, to cause to come before them twelve good and lawful men of the same county, each one of whom having freehold lands or tenements of the yearly value of forty shillings; and they shall be empannelled to inquire into the forcible entry or forcible detainer complained of.”

The justices shall likewise make out their summons, — the form of which is also given in the statute, — to the party complained against, which must be served as any original summons against an individual, returnable before a justice of the peace; and if the defendant do not appear, the justices are required to proceed in the same manner as if he were present.

The statute then provides the oath which shall be administered to the jury and the form of their verdict. If the verdict be against the defendant, or party complained against, a writ of restitution is awarded, the form of which is also given in the statute; if otherwise, the defendant shall have his costs.

No appeal is allowed from the judgment of the justice, but the proceedings may be removed by *certiorari* into the Supreme Judicial Court holden in the same county.

By a proviso of the statute above cited, proceedings under it are limited, and no person can be proceeded against, who “hath had the occupation or been in the quiet possession of any lands and tenements by the space of three whole years together, next before, and whose estate therein is not ended and determined.”

A mere refusal to deliver possession of land when demanded, is not a foundation for the institution of this process. The possession must be attended with such circumstances as would tend to excite terror in the owner, and prevent him from claiming or maintaining his rights.¹

The *Stat.* 1825. *ch.* 89. providing further remedies for landlords and tenants in certain cases, where the possession is retained against the will of the landlord,² seems to be sufficient to reach almost all the cases provided for by this statute.

SECT. XV. SUMMONS IN PROCESS FOR THE SPEEDY REMOVAL OF NUISANCES.

By *Stat.* 1801. *ch.* 16. a process is given for the abatement of nuisances similar to that which has just been considered against forcible entry and detainer. The complaint is to be made to the same persons. The form of the warrant to the sheriff,—of the summons to the defendant,—and of the oath and verdict of the jury, are given in the statute, and are the same, with verbal exceptions only, as those mentioned in the pre-

¹ *Commonwealth v. Dudley*, 10 Mass. Rep. 403. And vide *Commonwealth v. Bigelow*, 3 Pick. Rep. 31.

² Vide ante, Sect. XII. of this Chapter.

ceding section. The mode and time of service of the summons are precisely the same.

In this case, however, unlike the former, an *appeal* is given to the Supreme Judicial Court, which is regulated by the fourth and fifth sections of the statute.

SECT. XVI. SUMMONS IN PROCESS TO RECOVER DAMAGES FOR FLOWING LANDS.

By *Stat. 1795. ch. 74. s. 2.* a process somewhat similar to the two preceding ones, is given to a party to recover damages where his land has been flowed by a mill-dam.

The complaint in this case, however, must be made to the Court of Common Pleas, instead of to justices of the peace. The court then issues a warrant to the sheriff, or if he is interested, to a coroner of the county where the land lies, directing him to summon and empannel a jury of twelve good men who try the cause, and whose verdict is a bar to any action brought for such damages. The mode of drawing the jurors in this case is regulated by a subsequent statute.¹

The three preceding processes are not strictly writs. They have been mentioned, however, as being modes of instituting suits, prescribed by statute in the particular cases, and analogous to that of commencing actions by writ in courts of law.

¹ Stat. 1814. ch. 173.

Note. A *writ of error* is a *judicial* and not an original writ, *Grosvenor v. Danforth*, 16 Mass. Rep. 74. It is not therefore placed in the foregoing enumeration of writs by which a suit is commenced. It will, however, be considered in the second book.

CHAPTER VIII.

REQUISITES OF A WRIT.

SECT. I. THE DECLARATION WHICH A WRIT MUST CONTAIN.

Though, as has been stated, the forms of writs, as prescribed by statute, must be used in all cases, where they apply, yet those forms are mere skeletons, without any sense, until they are filled up by a description of the parties, and of the cause of action; and this can be done only by inserting some count descriptive of the nature of the demand.

In all the forms of original writs used in our practice, the declaration must be inserted before the writ is issued for service;¹ for it is intended by the statutes that the party whose goods are attached, or whose body is arrested, should at the time of the service of the writ, have notice of the nature of the demand against him. The declaration, therefore, must be complete, and form a part of the writ, at the commencement of the suit. A defect in this particular may be taken advantage of, by a plea in abatement, and the writ cannot be amended by inserting a declaration after service, without the consent of the defendant, and not then as against subsequent attaching creditors.²

In like manner, in all proceedings in equity, when

¹ *Isley et al. v. Stubbs*, 5 Mass. Rep. 280. *Brigham v. Este*, 2 Pick. Rep. 420.

² *Ibid.*

the suit is commenced by summons, or summons and attachment, the bill itself must be inserted.

SECT. II. DIRECTION OF WRITS TO THE OFFICER.

All writs and processes should be directed to the officer by whom they may legally be served. The officers authorized to serve writs in our practice are, *sheriffs* and their *deputies*, *coroners* and *constables*.

To sheriffs and their deputies. By Stat. 1783. ch. 44. sheriffs and their deputies are empowered to serve all processes and writs, in their proper counties, to them directed and committed, and which are issued by good and lawful authority. And all the writs and processes which have been enumerated as used in our practice, may be directed to the sheriff or his deputy, unless either be a party, and be served by either indifferently, except the four following, viz. writs de homine replegiando,¹—processes against forcible entry and detainer, issued by two justices,²—processes issued in like manner on complaints for nuisances,³—and processes from the Court of Common Pleas, to recover damages for flowing lands,⁴—which four *must* be served by the sheriff personally, where he is not a party, and never can be by any of his deputies.

In cases where sheriffs or their deputies may serve the writ at all, any writ may be directed to the sheriffs or their deputies of any number or all the counties in

¹ Stat. 1786. ch. 58. *Wood v. Ross*, 11 Mass. Rep. 271.

² Stat. 1784. ch. 8.

³ Stat. 1801. ch. 16. s. 2.

⁴ Stat. 1795. ch. 74. s. 2.

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the commonwealth, each county being distinctly named, and service of the writ may then be made in all or any of the counties named. And there seems to be no reason why, if after service of the writ has been made in any one or more counties originally named in the direction to the officer, the plaintiff should require to have the same served in any one or more other counties, he may not add directions to the sheriffs, &c. of such other counties and cause the writ to be served there; and this at any time before service has been completed by leaving the summons.

To coroners. By *Stat. 1783. ch. 43.* coroners, within the counties for which they are respectively appointed, are empowered to serve all writs and processes where the sheriff or either of his deputies is a party to the suit: and so also, by *Stat. 1792. ch. 17.* when the office of sheriff is vacant. And in such cases the writ must be specially directed to the coroner, and the direction to the sheriff or his deputy stricken out.

Questions of great importance have formerly arisen, as to the cases in which the sheriff or his deputy was so far a party, as to require a direction of the writ to a coroner, a mistake in such a case being fatal, because a coroner cannot serve a writ, if the sheriff or his deputy may.¹

Where a town, precinct, or parish was a party, it has always been holden, that a sheriff, who was an inhabitant, was incompetent to serve the writ.² But

¹ *Gage v. Graffam*, 11 Mass. Rep. 181. *Merchants' Bank v. Cook*, 4 Pick. Rep. 405.

² *First Parish of Sutton v. Cole*, 8 Mass. Rep. 96. *Brewer v. New Gloucester*, 14 Mass. Rep. 216. *Merchants' Bank v. Cook*, 4 Pick. Rep. 405.

by *Stat.* 1817. *ch.* 13. it is provided, that sheriffs, deputy-sheriffs, coroners and constables may make service and return of all writs and processes to them duly directed, where the town or district of which they are the inhabitants, are parties or interested. Parishes are not provided for.

In the case of other corporations, as banks, turnpike companies, and the like, great difference of opinion prevailed throughout the state, until the decision of the case of the *Merchants' Bank v. Cook* just cited, in which it was settled, that a sheriff, who was a stockholder in a bank, which commenced a suit, was not a party within the meaning of the statute, and that the service of the writ by him was good.¹ It seems also to be settled by the reasoning of the court and the principle of that decision, that the sheriff must be a party on the record, to prevent him from serving the writ, and that his being in any way interested, or being, in fact, the sole party in interest, would make no difference.

A coroner, who is likewise a deputy sheriff, may serve a writ, where the sheriff or his deputy is a party, but it must be directed to him in his capacity of coroner.²

To Constables. By *Stat.* 1795. *ch.* 41. *s.* 3. constables in any town or district, are impowered to serve any writ, summons, or execution, in *personal* actions,

¹ Vide also *Adams v. Wiscasset Bank*, 1 Greenleaf Rep. 361. *Osborn v. United States Bank*, 9 Wheaton Rep. 738. *United States Bank v. Planters' Bank*, *Ib.* 904.

² *Colby v. Dillingham et al.* 7 Mass. Rep. 475.

where the damages sued for, or recovered, do not exceed the sum of *seventy dollars*. They have no authority, beyond this statute, as to the service of writs. They cannot, therefore, serve a writ in a real action,¹ nor a libel for a divorce.²

Constables may serve writs, where the sheriff or his deputy is a party, if the *ad damnum* does not exceed seventy dollars.³

The jurisdiction of constables, is confined to their own *towns*, as that of sheriffs, deputy sheriffs, and coroners is, to their own *counties*. But a constable may attach property in his own town, though the defendant be not an inhabitant or resident there.⁴ And any writ which a constable can serve at all, may be directed to, and served by, a constable in any number or all the towns of the Commonwealth, if it be a court writ, or of the county in which it issues, if it be a justice writ.

Care should be taken, in every writ, specially to insert a direction to the officer, by whom it is intended that it shall be served; for it is said by our court, in the case of *Wood v. Ross*,⁵ that “it may be considered necessary, that there should be a particular direction to the officer, even in cases where his authority to serve, is expressly recognized by statute.”⁶ A defect in this particular, might be taken advantage of, by plea in abatement, or by motion to dismiss the action,

¹ *Hart v. Huckins*, 5 Mass. Rep. 260. *Same v. Same*, 6 Mass. Rep. 399.

² *Brown v. Brown*, 15 Mass. Rep. 389.

³ *Briggs et al. v. Strange*, 17 Mass. Rep. 405.

⁴ *Ibid.*

⁵ 11 Mass. Rep. 271.

⁶ *Vide Brier v. Woodbury et al.* 1 Pick. Rep. 362.

if made before appearance entered, for an appearance would be a waiver of the objection.¹

An amendment, however, has been allowed, where the service has actually been made by the proper officer. Thus in the case of *Hearsey v. Bradbury*,² a motion was made by the defendant to the court, to dismiss the writ *ex officio*, for want of legal service, the writ having been served by a constable, although not directed to him. The *ad damnum* of the writ was under seventy dollars: and a majority of the court held, that as the constable had authority to serve the writ, had it been directed to him, and as the defendant had appeared, it was matter of form, which the court were authorized to allow to be amended, upon motion to insert the proper direction.

The common blank form of writ issued from the clerk's office always contains a direction "to the sheriff or his deputy," and if the writ to be made, can be served by them, nothing is necessary but to insert the name of the county, or counties, in which service is to be made. If the writ is within a constable's jurisdiction, and it is intended that it shall be served by that officer, the words "or to any constable of the town or towns of," &c. should also be inserted without striking out the preceding ones. But if the writ cannot be served by the sheriff or his deputy, the printed words should be stricken out and a direction to "the coroner of the county or counties of," &c. inserted, — or if within a constable's jurisdiction, and intended to be served by

¹ Vide *Campbell v. Stiles*, 9 Mass. Rep. 217. *Gage v. Graffam*, 11 Mass. Rep. 181. *Pollard et al. v. Dwight et al.* 4 Cranch. Rep. 421.

² 9 Mass. Rep. 95.

that officer to "the coroner of the county or counties of, or any constable of the town or towns of," &c. or perhaps simply "to any constable," &c.

When the writ is legally directed to several officers in the same county, it may, of course, be served by either of them.

SECT. III. DATE OF WRITS.

A writ should be dated upon the day that it is in fact issued for service. And to make a writ valid, the day of its date must always be subsequent to the last day of service for the preceding term, and sufficiently anterior to the next return day of the court from which it issues, to allow service of it to be made the required number of days previous to that return day. The rules in relation to the time required between the service and return of writs will be stated under the head of the service of writs.¹

SECT. IV. WHEN WRITS MUST BE MADE RETURNABLE.

All writs from the Supreme Judicial Court and the Court of Common Pleas, should be made returnable at the next succeeding term of the court, if issued a sufficient number of days before its sitting to allow legal service to be made, otherwise at the next following term. The time required between the service and

¹ Vide supra, Chap. X. Sect. II.

return of writs will be stated under the head of the service of writs.¹

No time is limited by law, *within* which writs issued by a justice of the peace must be made returnable, only that the distance between the service and return shall not be *less* than *seven* days.

The form in the statute not only requires that writs from the Court of Common Pleas should be made returnable to the next court, as above, holden for the county, but also that the day of the week and the week of the month, when the court is to be holden, should also be specified. Where, however, mistakes are made by the attorney, who issues the writ,—as in making it returnable the *second* instead of the *third* Monday in the month,—the Court of Common Pleas allows the plaintiff to amend his writ on motion. As the term is fixed by law, the mistake is one of form merely and there is something to amend by.²

The same is true of writs issued from the Supreme Judicial Court.

A mistake in the return day of justice writs presents more difficulty. There are no terms fixed by law for holding those courts, and no means of ascertaining the time, except from the statement in the writ. A writ returnable *Saturday the 17th*, when the 17th was Sunday, would be clearly void,—and if the 17th were Friday, it would seem equally so.³ A mere omission of the day of the week would be only a formal defect.

¹ Vide Chap. X. Sect. II.

² Vide Book II. Chap. on *Amendment*.

³ Vide *Wellman v. Lawrence*, 15 Mass. Rep. 326.

SECT. V. WHERE WRITS SHOULD BE MADE RETURNABLE.

In case of Individuals. When the plaintiff and defendant both live within the Commonwealth, all personal or transitory actions must be brought in the county where one of the parties lives. And when an action shall be commenced in any other county, than as above directed, the writ shall be abated, and the defendant allowed double costs.¹ So if there be several plaintiffs or several defendants, or both, and all living within the Commonwealth, the action must be brought in a county where some one of the plaintiffs or defendants dwells.

If the plaintiff, where there is but one, or all the plaintiffs, where there are several, live without the Commonwealth, the statute does not apply, and transitory actions may be brought, as before, in any county, at the election of the plaintiff or plaintiffs. But if one or more of several plaintiffs live within the Commonwealth, the action must be brought either in the county where the plaintiffs live, or in that of any of the defendants who reside within the Commonwealth.²

The foregoing rules are construed to apply to transitory actions merely ; such personal actions as were local, at common law, remain so, and must still, except before justices of the peace, be brought in the county where the cause of action arises.³

Against Justices, Officers, &c. Actions against

¹ Stat. 1784. ch. 28. s. 13.

² *Day et al. v. Jackson et al.* 5 Mass. Rep. 237.

³ *Pearce v. Atwood*, 13 Mass. Rep. 324. *French v. Judkins*, 7 Mass. Rep. 229.

- justices, sheriffs, constables and other officers, for official acts, are transitory and not restricted to the county where the acts took place, the English *Stat. 21. Jac. 1. ch. 12.* having never been adopted here,¹

In case of Corporations. In the case of *The Taunton and South Boston Turnpike Corporation v. Whiting*,² it was holden that the plaintiffs, having no commorancy, were not within the purview of the statute, and might bring their action in any county.

Whether this decision applies to all corporations, as not capable of commorancy, — or whether such as are strictly local, as towns, districts, &c. are within the statute, does not seem to have been discussed. In the case of *The Proprietors of the Kennebeck Purchase v. Crossman*,³ the court took a distinction with respect to the taxation of costs for travel, — that corporations, not such in virtue of their locality, having no particular place of residence, and the corporators not being such in right of their place of abode, should have no cost allowed for travel to attend court.

In the case of *The Hope Insurance Company v. Boardman et al.*,⁴ it was holden that the jurisdiction of the Federal courts, in suits brought by or against corporations, depended upon the citizenship of the individual members.

In penal actions. By *Stat. 1788. ch. 12. s. 2.* in all penal actions the offence must be alleged to have been committed in the county where it was in truth committed. The action therefore must always be

¹ *Pearce v. Atwood*, 13 Mass. Rep. 324. *French v. Judkins*, 7 Mass. Rep. 229.

² 9 Mass. Rep. 321.

³ 6 Mass. Rep. 458.

⁴ 5 Cranch. Rep. 57. *Bank of the United States v. Deveaux et al.* Ib. 61. *The Corporation of New Orleans v. Winter et al.* 1 Wheat. Rep. 91.

brought in that county ; and if the plaintiff shall not both prove the offence laid, and that the same was committed in that county, the issue shall be found for the defendant.

On judgments. By *Stat. 1795. ch. 61.* actions of debt upon judgments of the courts of this Commonwealth, — which by the common law, are local,¹ — may be brought in the same court, or before any court of record for the county, in which either of the parties to such judgment, their executors or administrators shall reside at the time of bringing such action ; and upon the judgment of any court of record of the United States, or of any of the states, an action may be brought in any county, where either of the parties, their executors or administrators may reside, or in which any valuable goods, credits or estate of any debtor in such judgment shall be found. This statute gives the plaintiff much less latitude, where one of the parties lives out of the state, than he enjoys in bringing transitory actions. Actions on *foreign* judgments, strictly so called, fall within the latter class.

In actions by and against Counties. By *Stat. 1809. ch. 128. s. 1.* any action local or transitory against the inhabitants of any county in their corporate capacity, may be commenced either in the county where the plaintiff lives, or in the defendant's county, at the plaintiff's election ; and when brought by any county, may be commenced in the county where the defendant lives, unless he lives in the same county, in which case, it may be brought in either of the adjoining counties.

By *sect. 2.* of the same statute when *any corporation* shall be a party to an action commenced by or against any county, the action shall be commenced in an adjoin-

¹ 1 Chitt. Plead. 272.

ing county. And by the 4th *section* of the same statute, the same rule is established as to actions between counties. The 3d *section* provides that any inhabitants of a county may commence their suit against such county, either within the same or an adjoining county.

Where City of Boston is a party. By *Stat.* 1815. *ch.* 103. *s.* 1. all suits in which the City of Boston is a party, may be brought in either of the counties of Norfolk, Essex or Middlesex.

On probate bonds. By *Stat.* 1786. *ch.* 55. *s.* 3. all suits upon probate bonds in the name of a Probate Judge must be brought in the county to which such Judge belongs.

Trustee writs. All writs in which any person or persons are cited as trustees must be made returnable in the county where the trustees dwell; or if they dwell in different counties, it must be made returnable in a county where some one dwells.¹

It will make no difference if the only person summoned as trustee be *afterwards* discharged, but if his name be originally inserted, for the purpose of giving the court of a particular county jurisdiction, and with a knowledge that he is not a trustee, it may be pleaded in abatement of the suit, either by the principal or by the trustee.² But it cannot be pleaded in bar:³ nor inquired into on motion.⁴

Justice writs. Writs issued by a justice of the peace were formerly by the form given in the statute,⁵ return-

¹ *Stat.* 1794. *c.* 65. *s.* 1.

² *Jacobs et al. v. Mellen and Trs.* 14 Mass. Rep. 132. And vide *Barker v. Taber, et al. and Trs.* 4 Mass. Rep. 81.

³ *Dunning v. Owen and Tr.* 14. Mass. Rep. 157.

⁴ *Davis v. Marston and Tr.* 5. Mass Rep. 199.

⁵ *Stat.* 1784. *ch.* 28. *s.* 3.

able at the dwelling house of the justice, and it was questionable whether a departure from the form in this particular would not be fatal, if duly objected to. By a recent statute however,¹ it has been enacted “that all actions and suits which may be tried by justices of the peace within this Commonwealth, and wherein they have jurisdiction, may hereafter be heard and determined by them at other places than their dwelling houses: *Provided* the same be usual and convenient places of business in the towns in which they reside.” And by the *second section* of the same statute, it is made lawful for said justices so far to vary the form of writs and processes issued by them, as to make the same returnable to said places, and the proceedings had thereon shall be good and effectual in law.

All actions brought before a justice of the peace must necessarily be brought in the county where the defendant lives, or where he may be found by the officer to whom the precept is directed. It was held in *Sumner v. Finegan*² that actions local at common law arising in one county might be commenced in any other, where the writ could be served on the defendant.

¹ Stat. 1828 ch. 64.

² 15 Mass. Rep. 280.

SECT. VI. INDORSEMENT OF WRITS.

The indorsement of writs was regulated by the *eleventh* section of *Stat.* 1784, *ch.* 28. until this section was repealed by the late *Stat.* 1833. *ch.* 50. s. 1.

1. *What writs must be indorsed.* By the *second* section of the *Stat.* 1833. *ch.* 50. it is provided, “that all original writs, writs of error, scire facias, or review,—bills in equity, libels for divorce,—petitions for partition, mandamus, certiorari, new trial, review, or for a sale by mechanics and others, having by law a lien upon any buildings or land, — if the plaintiff or petitioner is not an inhabitant of this Commonwealth, shall, before the same shall be entered in the court, or before the justice, where the same shall be by law returnable or commenced, be indorsed on the back thereof, by some responsible person, who is an inhabitant of this Commonwealth, either by himself or his agent or attorney.”

By the *third* section, it is provided, “that if, during the pendency of any of the processes aforesaid, the plaintiff or petitioner shall remove out of the Commonwealth, the court before which the same shall be pending, shall, on motion, order the plaintiff or petitioner, to procure such indorser ; and in case an indorser of any of the processes aforesaid shall, during the pendency thereof, remove out of the Commonwealth, or become insufficient to respond as hereinafter provided, and the plaintiff or petitioner shall not then have become an inhabitant of the Commonwealth, the court shall, on motion, order such plaintiff or petitioner to procure a responsible new indorser. And if any plaintiff or petitioner shall fail to comply with such

order of court when thereto directed, in either of the cases aforesaid, said process shall be dismissed.”

The changes effected by the foregoing statute, as to what writs are required to be indorsed, are the following:

1st. That no writs need now be indorsed, unless the plaintiff or petitioner either lives, or during the pendency of the writ removes, out of the Commonwealth.

2d. That, with the foregoing limitation to cases where the plaintiff lives or removes out of the Commonwealth, *justice writs* must be indorsed, which had not been required before: and also *writs of error*, which it had been before holden, being judicial writs, need never be indorsed.¹

It had been holden under the former statute, that a writ of *replevin* was an original writ, and therefore must be indorsed, notwithstanding the plaintiff was obliged to give a bond with sureties, for the payment of the costs, as well as to restore the property, if he failed to maintain his suit.² It is presumed that the same is true under the new statute.

The case, where there are several plaintiffs, some of whom live within and the others without the Commonwealth, is not directly provided for by the statute. It is presumed, however, that if any of the plaintiffs are inhabitants of the Commonwealth, the writ need not be indorsed.

It may here be remarked, by way of caution to practitioners, that though the necessity of any indorsement of writs is confined to cases, where the plaintiff or petitioner, in the writs and petitions enumerated in the statute, either lives, or during their pendency removes, out of the Commonwealth, yet that if doubt

¹ *Grosvenor v. Danforth*, 16 Mass. Rep. 74.

² *Gould v. Barnard*, 3 Mass. Rep. 199.

should arise in any case, either from the nature of the action, or the peculiar situation of the plaintiffs, or from any other cause, whether the writ should be indorsed or not, the safest course will be, to cause it to be indorsed, pursuant to the statute.

2. *Time when writs must be indorsed.* In the cases in which any indorsement of writs is required by the present statute, it must be made before the writs “shall be entered in the court, or before the justice”¹ &c. and need not be before service as was formerly requisite.

Under the former statute, which required the indorsement to be made before service, it has been holden, that if a writ be issued and served without an indorsement, and the defendant take advantage of the defect, by plea or motion at the first term, it is not in the power of the court, to permit an amendment by suffering the plaintiff then to indorse the writ, the words of the statute being explicit on this point.² And within the principle of this decision, it is presumed that the same would be true under the new statute, if a writ were *entered* before it was indorsed.

The provision in the present statute, that where any indorsement of the writ is required, it may be made before “*entry*,” remedies an inconvenience to which attornies have been exposed by the requisition of the former statute, that it should be made before “*service*.” Claims from out the Commonwealth are generally sent by letter and without any provision for the indorsement of the writ, and if immediate suit were directed, the attorney must either have become the indorser himself,

¹ Stat. 1833. ch. 50. s. 2.

² Decided at Supreme Judicial Court at Worcester, Sept. Term, 1831.

or refrained from commencing suit at the risk of losing security. But now, the writ can be issued and served without indorsement, — and the attorney will then have ample time to call upon his client out of the Commonwealth, either to furnish an indorser, or give security, before the time for *entering* the writ.

3. *What constitutes a valid indorsement.* By the present statute, in the cases where writs are required to be indorsed at all, the direction is simply, that they “shall be indorsed on the back thereof by some responsible person, who is an inhabitant of this Commonwealth, either by himself or his agent or attorney.”¹

It will be perceived, that the direction is not so particular in this as in the former statute, the indorsement not being required by special words, as it was before, to be made “with the christian and surname” of the indorser. And the rule laid down by our court in the late case of *Clark v. Paine*,² under the former statute, and which is even more applicable under the present one, may now be considered as the established rule. And that rule is that “the statute does not require an indorsement of the name in full, or designate how it shall be indorsed by abbreviation, initial letter or otherwise. This is left to the general rules of the common law, and any mode of signing the christian and surname, which binds the party to a bond or a note, is sufficient to satisfy the requisition of the statute. All such modes, therefore, of abbreviation, as are warranted by custom, as ‘Jno.’ for ‘John,’ ‘Bart.’ for ‘Bartholomew,’ or expressing one or more christian names by initial letters, which have long been con-

¹ Stat. 1833. ch. 50. s. 2.

² 11 Pick. Rep., 66.

sidered as sufficient and binding signatures to obligations, we think, are sufficient indorsements under this statute."

It may be remarked here, that under the present statute, the plaintiff will in no case be the indorser of his own writ, for if he live in the Commonwealth, the writ need not be indorsed at all; and if he live or remove out of the Commonwealth, he cannot be the indorser.

Though the statute requires the writ to be indorsed "on the back thereof," it was holden, in a case where a new indorser was ordered in the Supreme Court, in an action commenced in the Court of Common Pleas, that an indorsement on the *office copy* of the original writ filed in the former court, was sufficient to bind the indorser, without any indorsement of the original writ in the court below.¹

Where a corporation is plaintiff. What corporations are to be considered as so far "not inhabitants of the Commonwealth" that writs brought by them must be indorsed, remains to be determined.

The particular mode of indorsement, by a corporation, which has heretofore given rise to some questions,² becomes immaterial under the present statute, — as in fact a corporation will never be an indorser of a writ; for if the one suing should be considered as an inhabitant of the Commonwealth, no indorsement is necessary, and if otherwise, then the writ must be indorsed by "some responsible person who is an inhabitant of the Commonwealth, either by himself, or his agent or attorney."

² *Hartwell v. Hemmeway*, 7 Pick. Rep. 117.

¹ Vide *Middlesex Turnpike Corporation v. Tufts*, 8 Mass. Rep. 266. *Davis v. McArthur*, 4 Greenleaf's Rep. 82. note.

Where a minor is plaintiff. As minors cannot sue in their own names, their suits are generally brought by their *prochein amy*. And where both the minor and the *prochein amy* live either in the Commonwealth or out of it, there can be no difficulty as to the indorsement of the writ, for in the former case no indorsement is necessary, and in the latter it must be by some person, other than either, who does live in the Commonwealth.

A doubt can arise only where one of the persons, either the minor or the *prochein amy*, lives within, and the other without the Commonwealth, and the question, in such case will be, which of the two is to be considered the plaintiff in the suit, so as to determine whether the writ should be indorsed or not.

In the case of *Crossen v. Dryer*,¹ the court say, “the *prochein amy* is a party, within the meaning of the statute requiring original writs to be indorsed by the plaintiff, or his agent or attorney.” The writ, in this case, had been indorsed by the *prochein amy*, and a motion was made for a new indorser on the ground of his insufficiency. And as this objection could not be made under the statute then in force, where *the plaintiff* himself was the indorser, the decision of the court seems to determine that the *prochein amy* was the plaintiff in the suit. But in *Smith v. Floyd*,² where the infant had indorsed the writ, he was holden liable for the costs; and in answer to the objection that the *prochein amy* would be liable, it was said by the court, that “there must be a judgment against the infant before the defendant can proceed against the *prochein*

¹ 17 Mass. Rep. 222.

² 1 Pick. Rep. 275.

amy or any one else.” Now, as it is the *plaintiff* only, against whom a judgment must be obtained for costs, before the indorser can be proceeded against, — this case seems to hold that the infant is the plaintiff. In *Blood v. Harrington*,¹ the suit was originally commenced by the infant alone, and the writ indorsed by him. At a subsequent term leave was obtained to amend, by inserting the name of his *prochein amy*, and on a motion in arrest of judgment and for the dismissal of the action, it is said by the court, that “the admission of the *prochein amy* by way of amendment, we think, removes the objection. He is answerable for costs from the beginning, and the judgment will stand correct.”

The weight of authority, therefore, seems to be in favor of holding the *prochein amy* to be the party to the suit. And if so, in all actions where minors are plaintiffs, the writ should be indorsed or not, according as the *prochein amy* resides or not within the Commonwealth, and without reference to the place of residence of the minor.

The same rule would undoubtedly be applied, in case the suit were brought by a *guardian*.

Where a non compos is plaintiff. The same considerations above stated, as to the indorsement of the writ, seem to apply to actions brought by guardians of persons *non compos*.

If the action were brought by the *non compos* himself, and in his own name, it would be but the case of a common individual, and would fall directly within the statute. If he lived within the Commonwealth, no indorsement would be required, and if not, the writ

¹ 8 Pick. Rep. 552.

must be indorsed by a “responsible individual” in the Commonwealth. So that now, a person *non compos* need in no case be the indorser of a writ, and any question as to his capability of indorsing is rendered useless.¹

The same remark may be made as to all persons, whose ability to be the indorsers of writs, has heretofore been the subject of discussion.

Where the indorsement is by attorney. As, under the present statute, a plaintiff is, in no case, called upon to indorse his own writ, the only occasion in which an attorney need now have any thing to do with the indorsement of a writ, — if he be not himself the indorser, — will be as the attorney, if so authorized, of “the responsible person,” who, “either by himself or his agent or attorney” must indorse the writ, when the plaintiff is not an inhabitant of the Commonwealth.²

Mode of indorsing. As to the *mode* of indorsement in such a case, there can be no doubt that in all cases, under the present statute, whether the indorsement be made by the indorser in person, or by his agent or attorney, a compliance with the rule laid down by our court in the case of *Clark v. Paine* before cited,³ will be sufficient.

Liability of attorney. Under the former statute, the principal cases in which an attorney was connected with the indorsement of the writ, were those in which he indorsed the name of the plaintiff, and there seemed to be no way in which he could do it without becoming himself the indorser. For in *Chadwick v. Upton and*

¹ Vide *Clark v. Perkins*, 3 New Hamp. Rep. 339.

² Stat. 1833. ch. 50. s. 2.

³ 11 Pick. Rep. 66–69. and Vide ante. page 108.

*Trs.*¹ the court would not allow that the attorney might simply write the plaintiff's name, without adding his own at all, for they said "it would be an inducement to commence actions, if when the plaintiff was out of the Commonwealth, the attorney might put the plaintiff's name on the writ, and be free himself from responsibility;" and "convenience preponderates in favor of holding the attorney liable." And if the attorney did put his name on the writ in any way — as if he wrote "*A B by his attorney C D,*"² or "*C D attorney to A B,*"³ it was holden that he thereby became the indorser, as he clearly did, if he wrote his own name simply "*C D,*" or "*C D plaintiff's attorney.*"

It should be observed that under the former statute the attorney indorsed the plaintiff's name as a matter of course, — the authority to do so being incident to that of commencing the suit. But as under the present statute, the indorsement if required at all, must be by some third person, other than the plaintiff,⁴ an attorney now will never undertake to indorse the writ, — except he be himself the indorser, — without special authority from the third person who intends to become the indorser.

Whether, therefore, if an attorney were fully authorized to sign the name of such "responsible person," the court would apply the same rules under the present statute, as were applied when he acted for the plaintiff under the former one, — that is, whether they would

¹ 3 Pick. Rep. 442.

² *Chadwick v. Upton and Trs.* 3 Pick. Rep. 442 *Chapman v. Phillips*, 8 Pick. Rep. 25.

³ *Clark v. Paine*, 11 Pick. Rep. 66; and vide *Purple v. Clark et al.* 5 Pick. Rep. 206.

⁴ Stat. 1833. ch. 50 s. 2.

refuse to permit him simply to sign the name of the "responsible person" without adding his own at all,—and hold him liable if he signed such person's name with the addition of his own as attorney, cannot be determined. It is presumed, however, that the attorney would not be holden liable, for the two cases seem to be essentially different. In the former, where the attorney indorsed the plaintiff's name, and added his own as attorney, if he had not been made liable, the defendant would have had no security for the costs, beside that of the plaintiff, and that he would have had without any indorsement. But in the latter case, where the attorney having been sufficiently authorized, indorses the name of a "responsible person," who is an inhabitant of the Commonwealth, if such person is thereby made liable for the costs,—as he clearly is, for the statute expressly allows his indorsement to be made by attorney as well as in person,—then the defendant does obtain additional security to that of the plaintiff, and to hold the attorney liable at the same time, would in fact be giving the defendant two indorsers. And besides, the phraseology of the two statutes is entirely different. In the former, the words "shall be indorsed by the plaintiff, if he is an inhabitant of the Commonwealth, or by his agent or attorney, being an inhabitant thereof," present an alternative. They contemplate two distinct indorsements, one by the plaintiff himself, and the other by the attorney, and provide that either of the two shall be sufficient. But the words of the present statute, "shall be indorsed by some responsible person who is an inhabitant of this Commonwealth, either by himself or his agent or attorney," refer to but a single indorsement, and that by the "responsible person," the alternative being only as to the *mode* in which such person may indorse.

The attorney, however, should be careful to be fully authorized by the indorser to sign his name, and he should get such authority in writing, for if by any mistake or want of authority the indorser should escape, the responsibility would fall upon the attorney.

Where suit is brought on a probate bond. When a suit is commenced upon a probate bond, for the benefit of the heirs or creditors of the estate, it is provided by *Stat. 1786. ch. 55. s. 2.* "that the writ, in addition to the usual indorsement of the name of the plaintiff or his attorney, shall have the name of the person or persons, for whose particular use and benefit the suit is brought, written thereon."

No time is fixed in the statute, within which these names must be indorsed, but it is presumed that it should be done before *entry* of the writ, pursuant to the statute regulating indorsements generally. Whether an amendment would be permitted, has not been decided: but there seems to be no difference between this case and that of common indorsements.¹ Of course these indorsers need not be inhabitants of the Commonwealth, nor is it provided that new ones may be required in case of their insufficiency.

In *Padelford, Judge &c. v. Hall et al.*² it is said by the court, that the indorsement should specially designate the character in which the indorsers claim, whether as heirs, legatees, or creditors. And in a case in Maine, an indorsement that the action was brought for the benefit of an equitable assignee of a creditor, and of the attorney who had a lien on the judgment, was holden

¹ Vide ante. page 107.

² 2 Mass. Rep. 149. But vide *Potter, Judge, &c. v. Titcomb*, 7 Greenleaf's Rep. 302, where a designation of the character is holden to be unnecessary.

sufficient, the court saying that the language used in the statute was intended to embrace "all persons who might, *in any capacity*, be entitled to the money, which is the object of the suit, whether as heir, legatee, or creditor, or their executors, administrators or assignees."¹

In an action on a probate bond, brought for the benefit of the Treasurer of the Commonwealth, a successor in the office was permitted to substitute himself as indorser, the court observing, that it came within the equity of the *Stat. 1797. ch. 14.* authorizing Treasurers to prosecute to final judgment and execution, suits commenced by their predecessors, and pending at the time of their removal.²

4. *How and at what time objection must be taken for the want or insufficiency of an indorser.* The want or insufficiency of an indorser may be taken advantage of by plea in abatement or by motion.³

All exceptions for the *want* of an indorser, if, in consequence of the plaintiff's *residing* out of the Commonwealth, the writ should have been indorsed before entry, must be taken at the first term, or the defendant will be considered as waiving any objection, the provision of the statute being for his benefit.⁴ And, for the same reason, if the defendant becomes entitled to have the writ indorsed, in consequence of the plaintiff's *removal* from the Commonwealth, during the pendency of the suit,⁵ he should make his motion therefor as soon as the fact is known.

¹ *Potter, Judge, &c. v. Mayo et al.* 2 Greenleaf's Rep. 239.

² *Paine, Judge, &c. v. Gill et al.* 2 Mass. Rep. 136.

³ *Whiting v. Hollister*, 2 Mass. Rep. 102. *Gilbert et al. v. Nantucket Bank*, 5 Mass. Rep. 97.

⁴ *Ibid.*

⁵ Stat. 1833. ch. 50. s. 3.

In like manner, objections on account of the *insufficiency* of the indorser ought to be made at the first term, if the insufficiency then exist. And if the indorser during the pendency of the suit “shall remove from the Commonwealth, or become insufficient to respond, and the plaintiff or petitioner shall not then have become an inhabitant of the Commonwealth,” the motion which the defendant is authorized to make in such circumstances, “that the plaintiff or petitioner procure a responsible new indorser,”² should be made by him as soon as he is apprised of such removal or insufficiency of the previous indorser.

5. *Change of indorser.* It was formerly a question whether one indorser could be discharged, and another substituted except for the insufficiency of the former, and without the consent of the defendant.² But now by the *fourth* section of *Stat. 1833. ch. 50.* it is provided, “that the court, at any time during the pendency of either of the processes requiring an indorser, may, at their discretion, on motion of the plaintiff or petitioner, permit the name of any indorser to be stricken out, and a responsible new indorser substituted therefor.”

6. *Liability of the indorser.* The liability of the indorser of a writ is now regulated by the *fifth* section of *Stat. 1833. ch. 50.* which provides, “that, in case of the avoidance or inability of the plaintiff or petitioner, any indorser of such process shall be liable to pay to the defendant or respondent therein, and to any trustee who may be summoned therein, and to any assignee of such trustee, who shall become a party

² Stat. 1833. ch. 50. s. 3.

² Vide *Ely et al v. Forward et al.* 7 Mass. Rep. 25. *Oystead v. Shaw et al.* 8 Mass. Rep. 272. *Caldwell v. Lovett*, 13 Mass. Rep. 422.

thereto, and to any subsequent attaching creditor of the defendant, who may be admitted to defend against the same, all such costs as he or they may severally recover therein."

In what cases liable. It seems to be the object of the foregoing section to extend the liability of the indorser for costs, to every possible case in which costs can be recovered against the plaintiff.

In the former statute of 1784. *ch.* 28. the liability of the indorser was limited to cases where the plaintiff "failed to support his action." And under that clause, in a case where the plaintiff had appealed from the Court of Common Pleas, and in the Supreme Court recovered less than fifty dollars, so that by *Stat.* 1803. *ch.* 155. *s.* 5. then in force, the defendant had judgment for his costs, it was holden, that the indorser was not liable for them, as the plaintiff had not failed to support his action.¹ But this expression being omitted in the present statute, there is no doubt that the indorser would now be holden liable in such a case.

Even under the former statute, if the plaintiff discontinued, or became nonsuit, the indorser was holden liable equally, as in case of a verdict for the defendant;² and the same would undoubtedly be true now.

So if the defendant should prevail, not by denying or disproving the plaintiff's cause of action, but by filing and proving in *set off*, claims to a greater amount, — though the point has not been expressly decided — there is no doubt that the indorser would be liable for the costs recovered by the defendant. And, in general,

¹ *Fairbanks v. Townsend*, 8 Mass. Rep. 450.

² *Talbot v. Whiting*, 10 Mass. Rep. 359.

the rule under the present statute, would seem to be, that in all cases where the plaintiff is liable to costs, the indorser may be holden.

Under the present statute, however, as under the former one, the indorser is liable only "in case of the avoidance or inability of the plaintiff" to pay the costs, and accordingly any decisions upon this point made before the passing of the present statute, will be of equal authority now.

In *Ruggles et al. v. Ives*,¹ the indorser was considered as the surety of the plaintiff for the costs, and it was holden, "that the defendant ought to use reasonable diligence to recover the costs against the principal, the original plaintiff, before he shall have recourse to the surety, the indorser of the writ." "And," it was further said by the court, "the original plaintiff must avoid, or if he does not, he must be unable to pay the costs. Whether the principal has, or has not avoided, is matter of record, arising from the return upon the execution. And if *non est inventus* be returned, this return is conclusive evidence of the avoidance. So if the return be that the body is taken and committed in execution, such return is *prima facie* evidence of the plaintiff's inability, to be controlled only by evidence that he has satisfied the execution. Upon these principles, an execution must issue and be returned, before a *scire facias* can issue against the indorser." And to constitute such "reasonable diligence to compel payment of the costs from the original plaintiff" it was further holden in this case that "the execution ought to be sued out within a year after the rendition of the judgment for costs, and not be delayed until obtained

¹ 6 Mass. Rep. 494.

by a *scire facias* on the judgment after the year;” — “and that it must appear from the return that the principal has avoided, or that he is unable to pay the costs, by suffering his body to be imprisoned for not paying them.” It does not seem to be necessary that the execution against the plaintiff should be *returned* within the year, but only *issued*: and that, when returned, it should either show, that the plaintiff cannot be found, or that he has been committed.

The foregoing case seemed also to decide not only that the execution against the plaintiff should be issued within one year, but also that the *scire facias* against the indorser should be sued out within the same time. But this latter point has since been decided expressly to the contrary in the case of *Miller v. Washburn*,¹ where it was holden “that the statute, which provides for the liability of indorsers of original writs, has fixed no time, within which process shall issue: and although it may be reasonable to establish a limitation beyond which such liability shall not continue, it is not for us, but for the legislature to do it.” And no limit having since been fixed, the rule seems now to be, that if an execution has been duly issued against the plaintiff, within one year after the judgment for costs, and return has been made, either that he could not be found or has been committed, the indorser is liable upon a *scire facias* at any time afterwards; and that unless an execution against the plaintiff has been so issued and returned the indorser is not liable at all.²

¹ 11 Mass. Rep. 411.

² Note. If it should seem an objection to this rule that under the present statute, whenever there is an indorser, the plaintiff is “not an inhabitant of the Commonwealth,” and so out of the reach of an execution, it may be remarked that in *Ruggles et al. v. Ives* where the rule was laid down, the original plaintiffs belonged to New York.

It has been holden in New Hampshire,¹ that when the plaintiff lives within the State, and dies, pending the action, the indorser is thereby discharged. This has never been decided here and the precise point cannot arise now, as, if the plaintiff live in the Commonwealth, there will be no indorser. Still it is presumed that in any case where an indorsement is now required, the death of the plaintiff, pending the action, would discharge the indorser : for he is liable, as we have seen, only “in case of the avoidance or inability of the plaintiff,” and no execution can issue against a deceased plaintiff.

No case has been reported in this state in which the question has been raised, whether an indorser would be discharged in consequence of any proceedings that may be had in the action. In *Davis v. Mc Arthur*,² and *Shepley v. Story*,³ it was decided that the reference of an action by rule of court, did not discharge him. Whether a reference of the action and of all demands, might not, by analogy to the case of bail, have that effect, may be a proper subject of caution. Some difference may be found between the cases, in the consideration, that a defendant always has power to file in set-off, his demands against the plaintiff, and that the indorser is exposed to no more danger than he must necessarily have contemplated. The liability of an indorser of an original writ, cannot be affected by any judgment on a writ of review, which he did not indorse.⁴

Extent of liability. The present statute extends the liability of the indorser to, “all such costs” as the

¹ *Eaton v. Sloan*, 2 N. Hamp. Rep. 552.

² 3 Greenleaf's Rep. 27.

³ 3 N. Hamp. Rep. 63.

⁴ *Ely et al. v. Forward et al.* 7 Mass. Rep. 25.

persons therein named “may severally recover;” — the words, “and all prison charges that may happen,” which were added in the former statute, being omitted in this.

It is presumed, therefore, that the amount of the judgment for costs, recovered by the several persons named in the statute, would be the measure of the indorser’s liability. And at whatever stage of the action, even if after it has been carried to the Supreme Court, he become the indorser, he is liable for all the costs incurred in the suit, as well before, as after the indorsement.¹

It has been holden by the Supreme Court of Maine, where the defendant recovered judgment for his costs, and the plaintiff was committed on execution, that the indorser was not liable for the sheriff’s fees on the execution, nor for interest on the costs.²

To whom liable. The number of persons, to whom the indorser is liable for costs, has been enlarged by the present statute, embracing the defendant or respondent, any trustee³ who may be summoned, any assignee of a trustee who may become a party, and any subsequent attaching creditor who may be admitted to defend.

The statute evidently intends, that any person, who may, in any way, defend against the plaintiff’s suit, and obtain a judgment against him for costs, may also hold the indorser. And if there should be several defendants, some of whom were acquitted or discharged,

¹ *Hartwell v. Hemmenway*, 7 Pick. Rep. 117.

² *How v. Codman*, 4 Greenleaf’s Rep. 79.

³ The decision in *Chapman v. Phillips*, 8 Pick. Rep. 25, that the indorser is *not* liable to a trustee for his costs, is now, of course, superseded.

though the plaintiff prevailed and had judgment against the rest, there can be no doubt that the indorser would be liable to the former for their costs.

It has been holden in the Circuit Court of the United States,¹ that the indorser of a writ is not only liable to the defendant for his costs, but likewise to the officers of the court for their fees, such as for the service or entry of writs, and that the proper remedy to recover them is by an attachment issuing from the court, to compel the payment of them, the plaintiff not being an inhabitant of the State.

Form of action against indorser. The remedy against an indorser of an original writ is by *scire facias*, and not by an action of debt.²

In the case of an *audita querela*, however, the statute expressly provides, that the remedy against the indorser shall be by action of *debt*.³

¹ Anon. 2. Gall. Rep. 101. And vide *Caldwell v. Jackson*, 7 Cranch. Rep. 276.

² Vide *Ruggles et al. v. Ives*, 6 Mass. Rep. 494. *Miller v. Washburn*, 11 Mass. Rep. 411. *How v. Codman*, 4 Greenleaf's Rep. 79. *Reid v. Blaney*, 2 Greenleaf's Rep. 128.

³ Stat. 1780. chap. 47. s. 2.

CHAPTER IX.

COMMENCEMENT OF A SUIT.

The question, — what is the commencement of a suit, becomes often of great importance, — as in case of a *tender* or the *statute of limitations* being pleaded.

There is some contradiction in the English books upon this subject, owing to the peculiar practice of instituting actions, in England.

In the practice there, there is what is termed *process*, or *original process*, which precedes or is supposed to precede, the filing of the bill or declaration. In the Common Pleas, the first process, — now that a *real* original is dispensed with, is a *capias*, — in the King's Bench, a *latitat*, — in the Exchequer, a *quo minus*.¹

This *process* in these courts may be issued, either in term time, or in vacation. If in vacation, it must always bear teste, as of the last day of the preceding term.²

And the issuing of this *process* is for some purposes, considered the commencement of the action, and for some purposes, not.

Thus a *latitat* may, in some cases, be sued out, before the cause of action has accrued: — and if any cause of action accrue, before filing the declaration,

¹ 3 Black. Com. Chap. 18, 19.

² Cro. Jac. 561. 3 Keb. 213. *Davis v. Owen*, 1 Bos. and Pull. Rep. 343.

this will be sufficient.¹ In this case, the filing of the declaration, and not the issuing of the latitat, is deemed the commencement of the suit.

The same is true, also, though the writ be aailable one.² But althoughailable process may be sued out, the defendant must not be arrested before the cause of action has accrued.³

And in all cases, too, the cause of action must have accrued, before the declaration is filed.⁴

To avoid the statutes of limitations, however, or a tender, or to support a penal action, in point of time, the issuing of the latitat, is considered as the commencement of the suit.⁵

But in these cases, whatever be the *date* of the latitat, the true time of its issuing may always be shewn. So that, although a latitat, if sued out in vacation, must bear teste as of the preceding term, yet the defendant may shew the day when it issued. Thus, where to a plea of the statute of limitations, the plaintiff replied, that the defendant did promise “within six years next before the suing out of the latitat,” — a rejoinder, that though the latitat was tested of the 28th day of November, (the last day of Michaelmas Term,) yet that it was really and truly sued out after that time, to wit, on the 8th day of December in that year, — was sustained, and judgment rendered for the defendant.⁶

¹ *Foster v. Bonner*, Cowp. Rep. 454. *Johnson et al. v. Smith*, Burr. Rep. 950. *Swancott v. Westgarth*, 4 East. Rep. 75.

² *Best v. Wilding*, 7 Term. Rep. 4.

³ Vent. 28. *Swancott v. Westgarth*, 4 East. Rep. 75.

⁴ 1 Sell. Pract. 83.-4.-5.

⁵ *Johnson et al. v. Smith*, Burr. Rep. 950. *Foster v. Bonner*, Cowp. Rep. 454.

⁶ *Johnson et al. v. Smith*, Burr. Rep. 950. 1 Sell. Pract. 86.

The same doctrine here laid down, in regard to the *latitat* in the King's Bench, applies to the *capias* in the Common Pleas; — it having been settled, that in the case of all the statutes of limitation, it is enough to shew a *capias*, which every body understands to be now the commencement of a suit in the Common Pleas, the court always intending that an original has issued, and considering the *capias* as sufficient evidence of that.¹

In the inferior courts, as the Marshalsea, the *plaint* is considered the commencement of the suit.²

When it appears from the *record*, that the cause of action accrued *after* the commencement of the action, the defendant may demur, move in arrest of judgment, or bring a writ of error.³ If it appear in evidence, the plaintiff may be nonsuited.⁴

In *New York*, the *issuing or suing out of a writ*, and not the filing of the bill or declaration, is the commencement of the action.⁵ So in all cases, where the time is material to save the statute of limitations.⁶

Accordingly, a demand purchased by the defendant, after that time, or, as Livingston J. expresses it, “between the sealing of the process and the arrest,” cannot be set off against the plaintiff's demand, — the statute authorizing the filing in set off of such demands

¹ *Leader v. Moxon*, Black. Rep. 924–5. *Ward v. Honeywood*, Dougl. Rep. 62, and note. *Pinero v. Wright*, 2 Bos. and Pull. Rep. 235.

² *Ward v. Honeywood*, Dougl. Rep. 62.

³ Carth. 113. Yelv. 71 a. note.

⁴ Ibid.

⁵ *Lowry v. Lawrence*, 1 Caines' Rep. 69. *Bird et al. v. Caritat*, 2 Johns. Rep. 342. *Cheetham v. Lewis*, 3 Johns. Rep. 42. *Fowler v. Smith*, 15 Johns. Rep. 326.

⁶ *Burdick v. Green*, 18 Johns. Rep. 14.

only as the defendant may have, at the time he is sued.¹ Neither can the plaintiff recover a demand not due at the time of suing out the writ: nor will a right, acquired subsequently to that time, support his action.

Where it appeared upon the *record* that the *writ issued*, before the cause of action accrued, a special demurrer, for that cause, was sustained.² Such a defect would be bad, upon general demurrer also, nor would it even be cured by verdict.³

But a verdict will not be set aside, on a motion for a new trial, because the suit was commenced, before the cause of action accrued.⁴

In the justices court, the issuing of the summons or warrant, is deemed the commencement of the suit.⁵

In *Massachusetts*, likewise, the issuing of the writ is deemed the commencement of the action. And the *date of the writ*, and not *the time of its service*, is *prima facie* evidence of the time of its issuing.⁶

And if the date of the writ be the true time of its issuing, the writ will be considered as having been purchased on any part of the day of its date, to accord with the truth and justice of the case.⁷

But if the date of the writ be not the true time of its issuing, the real time, if important, may be shewn.

¹ *Carpenter v. Butterfield*, 3 Johns. Cas. 145.

² *Loroy v. Lawrence*, 1 Caines' Rep. 69.

³ *Cheetham v. Lewis*, 3 Johns. Rep. 42.

⁴ *Crygier v. Long*, 1 Johns. Cas. 393. *Lawrence v. Brown*, 2 Johns. Cas. 225.

⁵ *Bryce v. Morgan*, 3 Caines' Rep. 133.

⁶ *Badger v. Phinney*, 15 Mass. Rep. 359. *Ford v. Phillips*, 1 Pick. Rep. 202.

⁷ *Ibid.*

In such a case, however, it does not seem to be indispensably necessary to prove an actual delivery of the writ to the officer. It is sufficient, if it be shewn that it was actually made out, and sent to the officer by mail or otherwise, or left at his house, or elsewhere, for the purpose of being executed, — or that some act was done evincing a positive and unequivocal intention to have it served.¹

It has been holden in *Massachusetts*, contrary to the English and New York decisions before referred to² that a declaration laying the promise *after* the date of the writ, though bad on special demurrer, is cured by verdict.³

The Massachusetts doctrine has been adopted also in Connecticut.⁴

¹ *Burdick v. Green*, 18 Johns. Rep. 14.

² Vide ante. page. 125, 127.

³ *Bemis v. Faxon*, 4 Mass. Rep. 263. Yelv. 71 a. note.

⁴ *Story v. Barrell et al.* 2 Conn. Rep. 665.

CHAPTER X.

SERVICE OF WRITS.

The next step in the order of process, is the service of the writ upon the defendant. This is necessary, in *principle*, for the security of the plaintiff, and for giving notice of the suit to the defendant. The rules regarding the *manner* of service, however, are principally established by statute.

It may be remarked here, that all objections to the service of a writ should be made by plea in abatement or by motion ; and that if no service appear to have been made, the court will *ex officio* stay all proceedings.¹

SECT. I. BY WHOM ALL WRITS MUST BE SERVED.

All writs must be served by the officer, that is, the sheriff, or his deputy, the coroner, or a constable, to whom they are legally directed : and if legally directed to several of them, by either of those named.²

We have already seen, that a mistake in the direction of a writ may be amended, if the service were really made by an officer, who could legally make it.³ But if a writ be served by any other than the proper officer, however it may be directed, as if any of the

¹ *Gage v. Graffam*, 11 Mass. Rep. 181.

² Ante Chap. VIII. Sect. II. as to the direction of writs to officers.

³ *Ibid.*

writs required by statute to be served by the sheriff in person, be served by a deputy,¹ — or if a writ in which the sheriff or one of his deputies is a party, be served by any other person than a coroner, or a constable, when the amount is within his jurisdiction,² — or if a writ in which the *ad damnum* is more than seventy dollars, be served by a constable, — in all these cases, the proceedings will be set aside, on plea, or motion. But it seems, that if the defendant appear and answer, it is not error.³

SECT. II. TIME WHEN WRITS MUST BE SERVED.

1. *Writs returnable to the Supreme Judicial Court and Court of Common Pleas.*

Against individuals. — All writs returnable to the Supreme Judicial Court, or Court of Common Pleas, and which are against *individuals*, must be served *fourteen days* at least, before the day of the sitting of the court, to which they are returnable.⁴

And the same rule applies to the time of service of a trustee writ upon the principal defendant, even though a different rule be applicable to that of the service upon the trustee. Thus, if the trustee summoned, be one of those corporations, upon which the service, to be legal, must be made thirty days before the return day, the service upon the principal may still be made fourteen days only before that return day.⁵

¹ Vide ante. Chap. VIII. Sect. II. *Wood v. Ross*, 11 Mass. Rep. 271.

² *Gage v. Graffam*, 11 Mass. Rep. 181. And vide *Brier v. Woodbury et al.* 1 Pick. Rep. 362. *Briggs et al. v. Strange*, 17 Mass. Rep. 405.

³ *Gage v. Graffam*, 11 Mass. Rep. 181.

⁴ Stat. 1797. ch. 50. s. 1, 2.

⁵ Stat. 1794. ch. 65. s. 1.

Against corporations. — By *Stat.* 1783. *ch.* 39. *s.* 6. in suits against towns, precincts, parishes, or villages, or against the proprietors of any common and undivided lands, or other estate; and by *Stat.* 1785. *ch.* 75. *s.* 8. in suits against any town, or other body corporate, the writ must be served *thirty days*, at least, before the day of the sitting of the court, unto which it is returnable.

These two statutes embrace all corporations aggregate.¹ But by *Stat.* 1804. *ch.* 125. *s.* 6. in suits against *turnpike corporations*; and by *Stat.* 1833. *ch.* 124. *s.* 1. “whenever any process shall be commenced, which shall, by law, be required to be served upon any *manufacturing corporation, bank, or insurance company,*” the service of the writ or process shall be legal, if made not less than *fourteen days* before the sitting of court, to which the same shall be returnable. So that as to the four last named corporations, writs against them, need be served but *fourteen days* before the return day, while against all other ones, the service must be made *thirty days*, at least, before the day of the return.

A corporation can never be the principal defendant in a trustee process, as the statute giving this process confines it to personal actions, against persons “other than bodies politic or corporate.”²

Where a corporation is trustee. — The *Stat.* 1832. *ch.* 164. which first allowed the trustee process to be instituted against any corporation or body politic, required, in its *second* section, that the service thereof should be made “*thirty days* before the said process

¹ *Bullard v. Nantucket Bank*, 5 Mass. Rep. 99.

² *Stat.* 1794. *ch.* 65. *s.* 1.

shall be returnable, as is now by law required in suits wherein such corporation or body politic shall be the principal debtor."

This extended to all corporations. But the provision of *Stat. 1833. ch. 124. s. 1.* "that whenever any process shall be commenced, which shall, by law, be required to be served upon any *manufacturing corporation, bank, or insurance company*, the service thereof shall be legal if made not less than *fourteen days* before the sitting of the court to which the same shall be returnable," amounts to an exception of the three sorts of corporations therein named. So that now, a trustee writ, in which a manufacturing corporation, a bank, or an insurance company, is summoned as the trustee, is required to be served upon them, but *fourteen* days before the sitting of the court: but if any corporation, other than one of these three, be the trustee, the writ must be served upon them, at least *thirty* days before the return day.

The time required for service upon the corporation, summoned as trustee, as we have seen, does not affect that of the service upon the principal defendant, named in the writ. This latter is in no case required to be made but fourteen days before the return day.

2. *Writs returnable before a justice of the peace, or a justices' court.*

Against individuals. All writs returnable before a justice of the peace, and which are against *individuals*, must be served, at least, *seven days* before the day therein set for trial.¹

Against corporations. Writs against *corporations* returnable before a justice of the peace, it would seem,

¹ Stat. 1783. ch. 42. s. 1.

must be served, according to the requisitions of the statutes of 1783, 1785, 1804, and 1833, before cited, that is, the same number of days before the return day, as when returnable to the Supreme Judicial Court or Court of Common Pleas, no distinction having been made by any statute.

A trustee writ can, in no case, be returnable before a justice of the peace.

If the distance between the time of service and return, be less than the law requires, the defect may be taken advantage of by plea in abatement, or by motion to dismiss the action.¹ But, like other defects in the process, it will be cured by appearance and pleading over.²

SECT. III. WHERE WRITS MUST BE SERVED.

All writs must be served within the respective precincts of the officers who serve them, that is, within their *counties* by sheriffs, deputy sheriffs, and coroners, and within their *towns*, by constables.

SECT. IV. INSTRUCTIONS TO, — AND RIGHTS AND DUTIES OF THE OFFICER, AS TO THE SERVICE OF WRITS.

In general, it is the duty of the officer who receives a writ legally directed to him, to serve the same according to the directions contained therein. Where

¹ *Bullard v. Nantucket Bank*, 5 Mass. Rep. 99.

² 1 Sell. Pract. 239.

the writ given him, contains but a single command, as in the case of an "original summons," by which he is merely directed to summon,—or of a "summons and attachment," by which he is commanded to attach and to summon, no special instructions to him are necessary, except in the latter, whether he is to make a real, or a nominal attachment merely.

The only writ in which the command is in the alternative, is the one in most common use, which, as we have seen,¹ is given in the statute as a "capias and attachment," but which includes the "capias," and the "capias and attachment," and is, in fact, the one or the other, solely according to the mode of service. And when an officer receives such a writ, with no further directions either in writing or by parol, than those contained in the writ itself, he has a legal power to serve it either as a capias, or as a capias and attachment, that is by arresting the body, or attaching the property of the defendant. The usual practice, however, in such a case, where no special directions are given, is to make *common* service only, that is, to serve the writ as a capias and attachment, but by a nominal attachment merely. The same is true, as to the writ of summons and attachment.

In like manner, if the instructions given, and which are generally written on the back of the writ, be in the alternative, as, for instance, "to attach property or hold to bail," the officer may execute the writ in either way.² But if the direction be specific, then, if it be possible, the officer is bound to follow it, and a service in any other way would render him liable.

¹ Vide ante. page 55, 56.

² *Marshall v. Hosmer*, 4 Mass. Rep. 60. *Almy et al. v. Wolcott*, 13 Mass. Rep. 73.

From this rule, — that the officer is bound only by special directions, while, without them, he has an option as to the mode of service, the plaintiff or his attorney should indorse upon the writ, such direction, as “common service,” — “attach property,” — “hold to bail,” or more particular ones, according to circumstances. Such instructions, however, may be given verbally, and will be equally binding upon the officer.

If verbal instructions be given to the officer, by the plaintiff or his attorney, *after*, and different from, the directions upon the writ, the former must be obeyed, and not the latter.¹

When an officer has received a legal writ, with particular instructions to attach property, — if there be reasonable ground to induce him to believe, that in making an attachment, he may mistake, or expose himself to an action for damages, by attaching or seizing goods not the property of the debtor, he may insist upon the creditor’s shewing him the goods, and giving him sufficient security, to indemnify him for any mistake he may make, by conforming to the creditor’s directions.²

So if the instructions be, to take the body, the officer, if there be any question as to the identity of the defendant, may call upon the plaintiff to point him out, and to indemnify him, against the consequences of a mistake.³

But if the officer do not request the creditor or his attorney to shew him the debtor’s goods or person, or to indemnify him, but undertake to execute the pre-

¹ *Marshall v. Hosmer*, 4 Mass. Rep. 60. *Almy et al. v. Wolcott*, 13 Mass. Rep. 73.

² *Bond v. Ward*, 7 Mass. Rep. 123.

³ *Marsh v. Gold et al.* 2 Pick. Rep. 285.

cept of the writ, as well as he can, he is answerable to the creditor, if he do not attach or arrest the defendant's property or person, according to the instructions, if they were within his reach, and if the creditor be injured by the neglect.¹

If an officer have in his hands a writ with *general* instructions to attach property, and another writ against the same defendant, is afterwards put into his hands, and *particular* property pointed out to him by the plaintiff in the second writ, not before known by him to exist as the property of the defendant, he is bound to attach the same upon the second writ, and not upon the first.²

A special direction upon a writ, or special parol instructions to an officer, may justify him in not going beyond them; but they do not deprive him of the legal authority to obey the general command in the precept, to attach sufficient to secure the demand, if he have opportunity to do it, and choose to avail himself of it. Thus if he attach more property than he is specially directed to, he cannot afterwards do any thing to impair such attachment, to the injury of the rights already acquired.³

An officer is bound to tell whether he has any other writs in his possession against a defendant, or has made any prior attachments upon his property, if asked by a person who puts a writ into his hands against such defendant.⁴

¹ *Bond v. Ward*, 7 Mass. Rep. 123. *Marsh v. Gold et al.* 2 Pick. Rep. 285.

² *Goddard v. Austin*, 15 Mass. Rep. 133. *Turner v. Austin*, 16 Mass. Rep. 181.

³ *Turner v. Austin*, 16 Mass. Rep. 181.

⁴ *Ibid.*

SECT. V. HOW WRITS ARE SERVED.

All the original writs which have been enumerated as in use in our practice, may, in reference to the mode of service, be reduced to the four following, namely, *original summons*, — *capias*, — *capias and attachment*, — and *summons and attachment*. — Thus,

- | | |
|---|---|
| 1. <i>Original summons</i> , | } are indicated by their names. |
| 2. <i>Capias</i> , | |
| 3. <i>Capias and attachment</i> , | |
| 4. <i>Summons and attachment</i> , | |
| 5. Trustee process, is a <i>summons and attachment</i> . | |
| 6. Review, | } are each of them, substantially, an <i>original summons</i> , in all cases, except the writ of <i>audita querela</i> , which may also be in the form of a <i>capias and attachment</i> . ² |
| 7. <i>Scire facias</i> , | |
| 8. Writ of dower, | |
| 9. <i>Replevin</i> , | |
| 10. <i>De homine replegiando</i> , | |
| 11. <i>Audita querela</i> , | |
| 12. Ejectment by landlord against tenant, | |
| 13. <i>Habeas corpus</i> , and | |
| 14, 15, 16. The summons in the several processes enumerated, ¹ | |

There being, therefore, in reference to the mode of service, only the above named *four* varieties of writs, the subject of the manner of serving writs may be considered under the four following heads, namely.

1. Service of an original summons.
2. Service of a *capias*.

¹ Vide ante Chap. VII. page 54.

² Vide ante page 84.

3. Service of a *capias* and attachment.

4. Service of a summons and attachment.

And these will be considered in the four following Chapters.

Upon what person the service must be made. 1.

In case of individuals. — It may here be remarked of all the above modes of service generally — that where there is but a single defendant, the service is of course, made upon him; and where there are several individuals, defendants, the service must be made upon all of them.

The same is true of the service of trustee writs, both upon the principal defendants and the trustees.

2. *In case of corporations.* — In suits against *towns, precincts, parishes, or villages*, or against the proprietors of any common or undivided lands, or other estate,¹ or against any other body corporate² — excepting, of course, those, in relation to whom a different rule has been prescribed by subsequent statutes, as will be stated below, — the service of the writ must be made, by leaving a copy of the writ or summons, with the *clerk*, or with one or more of the *principal inhabitants* of such towns, &c. or with the *clerk*, or some *principal member*, of such other body corporate.

In suits against *turnpike corporations*, the service of the writ must be made, by leaving a true and attested copy thereof, with the *treasurer*, or some *individual member* thereof.³

¹ Stat. 1783. ch. 39. s. 6.

² Stat. 1785. ch. 75. s. 8.

³ Stat. 1804. ch. 125. s. 6. The provision of this Stat. 1804. as to the time and mode of service of writs upon turnpike corporations, seems to be confined to suits against them, "for unnecessarily delaying any pas-

In suits against any *manufacturing corporation*, *bank*, or *insurance company*, the service is made by serving a copy of the writ or summons, upon the *clerk* of such manufacturing corporation, or upon their *agent*, or other officer having charge of their business at their manufactory, — or upon the *cashier* of such bank, — or the *secretary* of such insurance company.¹

The same rules apply to the above named corporations respectively, as to the mode of service upon them, of trustee writs, in which they are summoned as *trustees*.²

senger, or for demanding or receiving more than legal toll." If so, then the above rule, as to the *mode*, as also that, stated ante page 131, as to the *time*, of service of writs upon turnpike corporations, must be considered as restricted to those particular suits, — and the writ, in all other cases, must be served upon them, within the time, and in the mode, prescribed for corporations generally, by *Stat. 1785*. cited in the preceding note.

¹ Stat. 1833. ch. 124. s. 1.

² Stat. 1832. ch. 164.

CHAPTER XI.

SERVICE OF AN ORIGINAL SUMMONS.

It is provided by statute, that in all suits, wherein the process is by original summons, the service thereof by the proper officer, shall be good and valid in law, either by his reading the writ or original summons to the defendant, or by leaving a true copy thereof at the house, or place of last and usual abode of the defendant, attested by such officer.¹

Accordingly, *the original summons*, whenever it is used, — and all those writs which have been stated in the last section of the preceding chapter, to be each of them, in substance, an original summons, are served simply by reading, or by an attested copy.

¹ Stat. 1797. ch. 50. s. 2.

CHAPTER XII.

SERVICE OF A CAPIAS.

SECT. I. ARREST IN GENERAL.

The second mode of serving a writ, is as a *capias*, that is, by arresting the defendant. This, the officer is authorized to do, by virtue of the command in the writ, — for want of goods or estate, “*to take the body of the defendant,*” and by a compliance with which command, the writ, as we have seen, is made a *capias*, in distinction from a *capias* and attachment.

Though the order in the writ in the form prescribed, be, to attach the goods, &c. and “*for want thereof,*” to take the *body*, yet the plaintiff may, if he choose, direct the body to be taken in the first instance, that is, he may, at once, use the writ as a *capias*. And the defendant cannot protect himself from arrest, by tendering property sufficient to secure the demand, for that would be to compel the plaintiff to use his writ, as a *capias* and attachment, when, in fact, he has an election to use it either as such, or as a *capias*.

But if the plaintiff wish the person of the defendant to be arrested, — that is, if he intend to use the writ as a *capias*, he must give such special direction, either on the writ, or verbally to the officer ; for though an officer would be justified in at once serving the writ as a *capias*, without further directions than those contained therein, he is under no obligation to do so. And, in fact, it is only by such special direction,

that the plaintiff can express his election, to use his writ as a *capias*.

And it should be observed, that if the plaintiff have once elected to have his writ served as a *capias*, and the body of the defendant have accordingly been arrested, he cannot afterwards have the same writ served as a *capias* and attachment, by attaching the defendant's property.¹ And the converse of this rule is equally true.

SECT. II. WHO MAY BE ARRESTED.

All persons are liable to be arrested, unless specially exempted.

By the *law of nations*, ambassadors and foreign ministers:—by the *Constitution of the United States*, the senators and representatives in Congress, in all cases, except treason, felony and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same:²—by the *law of the United States*, non-commissioned officers, privates, musicians, artificers, and marines, in the service of the United States, under the circumstances set forth in the several acts:³—by the *Constitution of Massachusetts*, members of the House of Representatives, on mesne process, during their going unto, returning from, and attending the

¹ *Brinley v. Allen*, 3 Mass. Rep. 561.

² Art. I. Sect. 6.

³ Stat. U. S. 1798. ch. 89. s. 5. Stat. U. S. 1799. ch. 154. s. 4. Stat. U. S. 1802. ch. 9. s. 23.

General Court :¹—by *Massachusetts Statutes*, executors and administrators, except upon scire facias, in case of waste ;² sheriffs while actually in office, on mesne process or execution ;³ and officers and soldiers in the militia, while engaged in military duty, on *civil* process,⁴—are all privileged from arrest.

By *Stat. 1795. ch. 75. s. 1.* it is provided, that when any person shall be arrested in trespass and ejectment, or other real action, the defendant's own bond and no other, shall be required for his appearance to answer the same.

By *Stat. 1830. ch. 131. s. 1.* it is provided, that no person shall be arrested, held to bail, or imprisoned on mesne process or execution, for any debt, less than *ten dollars*, contracted subsequently to July 1, 1831.

By the *second section* of the same statute, it is provided, that no *female* shall be arrested, held to bail, or imprisoned on mesne process or execution, for any debt, contracted subsequently to July 1, 1831,—except in cases, where any female shall be charged as trustee, for a sum exceeding ten dollars, in any judgment rendered by the Supreme Judicial Court, or Court of Common Pleas.

Parties to a suit, — witnesses, — jurors, — counsel, and all persons connected with a cause, which calls for their attendance in court, and who attend *bonâ fide*, — are protected from arrest, *eundo, morando, et*

¹ Chap. I. Sec. III. art. 10.

² Stat. 1783. ch. 32. s. 9.

³ Stat. 1783. ch. 44. s. 4.

⁴ Stat. 1809. ch. 108. s. 11.

redeundo.¹ So also a party in attending arbitrations,² and hearings in bankruptcy.³

It has been decided in Massachusetts, that a witness, to be privileged from arrest, must have been commanded to attend court, by process of law, and that if he come as a volunteer, without summons, he is not protected.⁴ A different rule, however, is established in England, protecting a volunteer, as well as one who has been legally summoned.⁵

Writ of protection. The persons thus privileged from arrest, in consequence of attending court, were formerly entitled, as a matter of course, to a writ of protection from that court upon request,—the application being usually made to the clerk of the court,—who, in all cases, where it appeared from the docket, a subpoena, or the return of jurymen, that the party applying was entitled, was authorized to furnish such writ.

But the practice having been abused in many cases, both by parties and witnesses, a new rule was made by the Supreme Judicial Court, ordering that “no writ of protection shall issue except by the order of court, or some one of the judges thereof, such order to be made upon the application of the person for whom such writ of protection is to be issued, or of some person by him duly authorized; and no order will be made

¹ *Meekins v. Smith*, 1 H. Black. Rep. 636. *Ex parte McNeil*, 6 Mass. Rep. 245.

² *Spence v. Stuart*, 3 East. Rep. 89. and cases cited in note 1.

³ *Arding v. Flower et al.* 8 Term. Rep. 534. *Sidgier v. Birch*, 9 Vez. Jr. Rep. 69.

⁴ *Ex parte McNeil*, 6 Mass. Rep. 264.

⁵ *Meekins v. Smith*, 1 H. Black. Rep. 636. *Arding v. Flower et al.* 8 Term. Rep. 534.

for granting such writ of protection until it shall be made to appear to the court or judge applied to, by affidavit, or other satisfactory evidence, that the application is made in good faith, and for the purpose of enabling such person to attend the court, as a party or witness in some cause pending, such cause to be specified :— if a *party*, that such suit has not been commenced by him collusively, or if a defendant, that such suit has not been commenced against him by his request or procurement collusively, and to enable him to obtain a writ of protection; or, if a *witness*, that he has been duly summoned by process to attend as a witness, and that he has not been so summoned by his own request or procurement, or collusively, to enable him to obtain the writ of protection applied for.¹”

This rule specifies only parties and witnesses ; it would seem, therefore, that *jurymen* are still entitled to a writ of protection, to be issued as of course, by the clerk.

Such writ however is not necessary, and is no further useful, than as it serves to give notice to the officer, of the defendant's privilege, of which he is not otherwise bound to take notice.² For if the defendant be entitled to, though he do not actually have, a writ of protection, — upon being arrested, the court will discharge him from the arrest on motion, and order the bail bond, if one have been given, to be cancelled.³

In the case last cited, it was holden, that if the person were not legally entitled to an exemption from arrest, the writ of protection would not avail him. But

¹ Reg. Gen. S. J. C. 49. Appendix A.

² Wm. Black. Rep. 1194.

³ Case of McNeil, 3 Mass. Rep. 288.

now, in cases of parties and witnesses, the writ being granted only upon a proper and full examination by the court, or a presiding judge thereof, there seems to be no reason why it should not be conclusive upon the officer, about making the arrest; and, to attempt an arrest in such case, would probably subject the officer to punishment for a contempt of court.

This privilege from arrest, is a personal one, of which the party entitled may avail himself for his protection; but if he waive it, and submit to the arrest, he cannot afterwards object to the arrest as unlawful.¹

The ground upon which courts interfere, and order the person to be discharged from custody, is, that of contempt of court, by arresting persons giving their attendance upon it. This power of discharging, therefore, would seem to be confined to that court, at which the party arrested, is attending.²

SECT. III. HOW AN ARREST MAY BE MADE.

An arrest is made, by taking the person into actual custody. This is usually done, by putting the hand upon the individual,³ though this is not necessary, if the officer have the party in his power, — or if the party have submitted himself to the officer.⁴ So that after such a submission, without an actual touch, an escape, or a rescous would be the same in their consequences, as if the officer had put his hand upon the party. — And any touch, however slight, will be suffi-

¹ *Brown v. Getchell et al.* 11 Mass. Rep. 11.

² *Kinder v. Williams*, 4 Term. Rep. 377.

³ *Genner v. Sparks*, 1 Salk. 79. 1 Went. 306.

⁴ *Horner v. Battyn*, Bull. N. P. 62.

cient to constitute a valid arrest, — even though it be through a door or window.

If the officer, making the arrest, have several processes against the party arrested, — the latter is considered as arrested on them all. And if while the party is in custody, other writs against him be delivered to the officer, the party will be considered as arrested on them, though nothing further be done.

It is not necessary, to constitute a valid arrest, that it should be made personally, by the officer, who has the precept. Having a right to employ assistants, in the execution of any process, and that, too, by parol, an arrest made by one of such assistants, provided the officer be near, and acting in the arrest, though not in sight, is equally valid, as if made by the officer himself.¹

SECT. IV.. WHEN AN ARREST MAY BE MADE.

On *criminal* process, a party may be arrested at any time, before the return day, — and that, too, by night, as well as by day.²

Upon *civil* process, generally, an arrest may be made, on any day except *Sunday*. An arrest on that day is void :³ — and not only so, but if a party be detained from Sunday, until Monday, and then arrested, either at the suit of the party detaining him, or of any other, who was connected with or consant of the deten-

¹ *Blatch v. Archer*, 1 Cowp. Rep. 63. Bull. N. P. 63. *Commonwealth v. Field*, 13 Mass. Rep. 321.

² 9 Co. 66.

³ Stat. 1791. ch. 58. s. 9. Vide *Spence v. Stuart*, 3 East. Rep. 88. *Birch et al. v. Prodger et al.* 4 Bos. and Pull. Rep. 134.

tion, the service, in either case, is void. The court in such a case, will discharge from arrest, upon motion;¹ — set aside all subsequent proceedings;² — and the party arrested, may also maintain an action for false imprisonment against the officer, as if the arrest had been made without any such civil process.³

But if, after such detention from Sunday until Monday, the defendant were arrested, at the suit of a person, wholly ignorant of and disconnected with the previous detention, the arrest would be valid.⁴

A defendant, however, who has escaped, may be retaken on Sunday.⁵ And bail may take their principal on Sunday, and keep him till Monday, and then surrender him.⁶

An arrest cannot be made upon a writ, after its return day. If it be, the court will discharge upon motion.⁷ But it may be made on the return day.⁸ And it has been decided, that an execution returnable to a court, holden on a certain day, may be executed at any time, on that day, before the court adjourns: — and that if the officer have begun to execute it, before the return day, it is sufficient, and he may complete it afterwards.⁹

¹ *Ex parte Wilson*, 1 Atk. Rep. 152. Bac. Abr. Shff. N. 4. *Lyford v. Tyrrel*, 1 Anstr. 85. *Atkinson v. Jameson*, 5 Term. Rep. 25. *Hall v. Roche*, 8 Term. Rep. 187.

² *Robb v. Moffat*, 3 Johns. Rep. 257.

³ *Genner v. Sparks*, 1 Salk. 79. Stat. 1791. ch. 58, 59.

⁴ *Barclay et als. v. Faber*, 2 Barn. & Ald. Rep. 743. 1 Arch. Pract. 80.

⁵ Anonymous, 6 Mod. Rep. 231. *Atkinson v. Jameson*, 5 Term. Rep. 25.

⁶ Ibid.

⁷ *Loveridge v. Plaistow*, 2 H. Black. Rep. 29.

⁸ *Adams v. Freeman*, 9 Johns. Rep. 117.

⁹ *Prescott v. Wright*, 6 Mass. Rep. 20.

SECT. V. WHERE AN ARREST MAY BE MADE.

It is a general rule, that upon *civil* process, an officer cannot break the outer door, or a window of a dwelling house, — every individual being, by law, protected from arrest, in his own house, if he choose to shelter himself therein.¹

In execution of an *habere facias*, however, an officer may break an outer door, as an entry is necessary to the delivery of possession. So also, he may justify the breach of a house, to arrest, or seize the goods of, any person therein, other than the owner, the owner's children, domestics, permanent boarders, or inmates, who have made the house their home; because it is to these alone, and to goods lawfully in the house, without fraud or covin, — that the privilege of the house, as a castle, is confined.²

But an officer cannot justify the breach of a house, in such a case, upon the *suspicion*, that the person or goods of one, not entitled to its protection, are concealed there; — he must act at his peril, and be justified or condemned by the event.³

If an arrest, however, have once been legally made, and the person escape to his house, the officer may break the house, to retake him.⁴ And in *criminal*

¹ *Lee v. Gansel*, 1 Cowp. Rep. 1. *Semagne v. Gresham*, Yelv. 29 a. and note 1. 5 Co. 91.

² *Ibid.* *Oystead v. Shed et al.* 13 Mass. Rep. 520.

³ *Ratcliffe v. Burton*, 3 Bos. and Pull. Rep. 223, and cases cited in argument.

⁴ *Foster's Crown Law*, 320. *White v. Wiltshire*, Palm. 53. 2 Rol. Rep. 138, S. C.

process, the officer may always break the outer door, or window, after demand and refusal of entrance.¹

When lawfully in the house, the officer may break the inner doors, trunks, closets, &c. to execute civil process. And no previous demand of admittance, in such a case, is necessary.²

With the foregoing exception, an individual may be arrested any where. And the exception is confined exclusively to the dwelling house,—and does not extend to the defendant's store, barn, outhouse, or any public building.³

If an officer break open an outer door, to execute *civil* process, except in the before named cases, he is a trespasser, and the owner may defend himself as against any trespasser.

It is said, that though by such an illegal act, the officer become himself a trespasser, yet that the service by him, after such breach and entry, is legal and valid.⁴ But this is questionable: at least, it has not been settled, by any direct authority.⁵ And it has been decided, that where there has been an irregular arrest, and advantage been taken of it, to charge the person in custody, at the suit of another, the court will discharge from both arrests.⁶

¹ 5 Co. 93.

² *Hutchinson v. Birch et al.* 4 Taunt. Rep. 620. *Williams v. Spencer*, 5 Johns. Rep. 352.

³ Keb. 698. 1 Sid. 186.

⁴ 5 Co. 93. Dictum of C. J. Parsons, in *Widgery et al. v. Haskell*, 5 Mass. Rep. 155.

⁵ Yelv. 29 *a. n.* 1.

⁶ Yelv. 29 *a. n.* 1. *Ex parte Wilson*, 1 Atk. Rep. 152.

SECT. VI. DUTY OF AN OFFICER, IN MAKING
AN ARREST.

To the plaintiff. The officer, having received a legal precept, and having received, also, special directions from the plaintiff, or his attorney, either in writing or by parol, to serve the same as a *capias*, is bound to arrest the defendant, if to be found within his precinct. For a return, that the defendant *cannot* be arrested, or that the precept *cannot* be served, for *resistance*, can never be justified, inasmuch as the officer, in the execution of such process, may command the *posse comitatus*.¹

For the same reason, an officer, when he has once arrested, must, at his peril, retain the defendant. It is presumed, however, that in both cases, were the officer overcome by actual force, he would be liable to nominal damages only.

If the defendant be known, or can be easily ascertained, the officer must arrest him, upon the mere direction of the plaintiff. If otherwise, and there be a question as to the identity of the defendant, the plaintiff is bound, as in the attachment of property, upon demand, to point him out, and to indemnify the officer, against the consequences of a mistake.²

Should there be several persons, of precisely the same name and occupation, in his precinct, — and the officer be unable, by any means, to ascertain, which is the defendant named in the writ, — the safest return for him to make, would be, — that he did not know

¹ 2 Inst. 193, 453. Bac. Abr. Shff. N. 2.

² *Marsh v. Gold et al.* 2 Pick. Rep. 285.

upon whom to serve it, for a return of “*non est*,” would be false.¹

To the defendant. An officer generally known as such, is not bound to shew his writ, before he serves it: — but after service, or when the defendant has submitted to the arrest, if the defendant demand it, and not otherwise, he is bound to make known the cause of the arrest.² A *special* deputy, however, and perhaps a newly appointed officer, also, ought to shew the writ before executing it.³

The refusal of the officer to shew his writ, when bound so to do, will not make him a trespasser *ab initio*. But the service, in such a case, may be set aside for irregularity.⁴

SECT. VII. CONSEQUENCES OF MISTAKES IN AN ARREST.

If the defendant be rightly named in the writ, but the sheriff execute his process upon the wrong person, though of the same name with the right one, he will be a trespasser. And it would be the same, though the person arrested, declared that he was the individual named in the writ.⁵

If the writ describe the defendant by a wrong name, unless he be known as well by that given him, as by his true one, — the officer cannot arrest him. If he

¹ Dalt. Shff. 112, 113.

² *Blatch v. Archer*, 1 Cowp. Rep. 63. *Crowther v. Ramsbottom et als.* 7 Term. Rep. 654. Bac. Abr. Shff. N. 1. 9 Co. 66. *Commonwealth v. Field*, 13 Mass. Rep. 321. Countess of Rutland's case, 6 Co. 53.

³ Bac. Abr. Shff. N. 1.

⁴ *Thomas v. Pearce*, 2 Barn. & Cress. Rep. 761.

⁵ 1 Burr. Rep. 210. Moore, 457.

do, the defendant may not only plead in abatement, — but may, also, maintain an action of trespass against the officer, for false imprisonment.¹ In one such case, the court discharged the defendant upon motion.²

The difference between the names, however, must be a material one: for when there is only an inaccuracy in the spelling, so that the name is still *idem sonans*, the rule does not apply.³

But an appearance by the defendant in the suit, either by his wrong name or his right, without pleading in abatement, will render him liable to be taken on the execution, by the wrong name.⁴

¹ *Cole v. Hindson*, 6 Term. Rep. 234. *Shadgett v. Clipson*, 8 East. Rep. 328. *Coffall v. Hentley*, 1 Marsh. Rep. 75.

² *Wilks v. Lorck*, 2 Taunt. Rep. 400.

³ *Ahitbol v. Beniditto*, 2 Taunt. Rep. 401.

⁴ *Crawford v. Satchwell*, 2 Strange. Rep. 1218.

CHAPTER XIII.

SERVICE OF A CAPIAS AND ATTACHMENT.

It is by the attachment of property, that the capias and attachment, and those writs which have been stated to be substantially like this, are served. And this mode of service is effected,

First, By attaching property, in pursuance of the command in the writ, "*to attach the goods or estate of the defendant,*" and

Secondly, By summoning the defendant to appear at the court, from which the writ issues, upon the return day named therein.¹

The summons. — The form of summons used in this case, is given in *Stat. 1784. ch. 28. s. 1.* immediately following the form of the writ. It must be filled up, by a direction to the defendant, — a specification of the term of the court, at which he must appear, — the name of the plaintiff, — and a brief description of the nature of the action, as "in a plea of the case," or "of debt," or "of trespass," according to the fact, "as set forth in the writ." The amount to which his property is attached, should also be inserted, and the summons be dated, in the same manner as the writ.

The service of this summons upon the defendant, which is always necessary to complete the service of a writ of capias and attachment, is made, either by

¹ Stat. 1797. ch. 50. s. 1.

delivering it to him, or by leaving it at his last and usual place of abode, the requisite number of days, before the return day of the writ.¹ It is not necessary, however, nor is it usual in practice, to serve the summons at the same time, that the attachment is made; it is sufficient, if it be done, at any time before *fourteen days* prior to the return day.² The writ alone, therefore, is generally given to the officer, at the time the attachment is made, and the summons at any time afterwards, in season for legal service.

It has already been stated, that a *capias* and attachment may be served by a nominal attachment merely, and service of the summons as above.

SECT. I. ORIGIN OF THE RIGHT OF ATTACHING PROPERTY.

The practice of attaching the property of the defendant on mesne process, and holding it to satisfy any judgment which the plaintiff might recover, was unknown to the common law.

In real actions, however, property might sometimes be distrained, in order to compel a party to appear in the suit, but as soon as the party did appear, the attachment was dissolved.

From this practice of distraining to compel an appearance, our present law of attachment took its origin. The right of attaching property, was first extended to all actions, — afterwards the attachment was allowed to continue until judgment, — and finally, it was pro-

¹ Stat. 1797. ch. 50. s. 1.

² *Almy et al. v. Wolcott*, 13 Mass. Rep. 73.

vided, that it should continue for *thirty days* after judgment, to enable the creditor to seize it on execution;¹ which is the present law.

SECT. II. WHAT PROPERTY MAY BE ATTACHED.

1. *Real estate*. — All *legal* estates in lands may be attached; — but merely *equitable* interests are not liable to attachment, unless made so by statute.²

The only interest of this kind, which has been made subject to attachment, by statute, in this Commonwealth, is the equity of redeeming mortgaged estates.³ So that legal estates in land, and equities of redemption, are all the subjects of attachment, which fall under the head of real estate.

There have been some decisions in our courts, growing out of the rights to mortgaged premises, and of the liability of equities of redemption to attachment, which it may be proper to mention in this connexion.

Thus it has been holden, that the interest of a mortgagee, in the land mortgaged to him, cannot be attached in a suit against him, until after he has entered for condition broken, and, *it seems*, not until foreclosure.⁴

So the right which a mortgagor has, by statute,⁵ to

¹ Ancient Charters, &c. pages 50, 192, 193, 367. Stat. 1784. ch. 28. s. 11. *Bond v. Ward*, 7 Mass. Rep. 123, 128.

² *Russell v. Lewis*, 2 Pick. Rep. 508, 510.

³ Stat. 1798. ch. 77. s. 3.

⁴ *Portland Bank v. Hall*, 13 Mass. Rep. 207. *Blanchard v. Colburn et ux.* 16 Mass. Rep. 345. *Eaton v. Whiting*, 3 Pick. Rep. 484.

⁵ Stat. 1815. ch. 137. s. 1.

redeem from the purchaser, his equity of redemption, after it has been attached and sold on execution, has been holden not to be such an interest, as can be attached in a suit against the mortgagor.¹ But yet this interest is one, which the mortgagor may assign or mortgage;—and if he mortgage it, his right to redeem such mortgage, may be attached.²

A seizin of lands, for an instant, is not liable to attachment.³

Where a deed of real estate was acknowledged before the register of deeds, and handed to him to be recorded, and at the same instant, a creditor of the grantor attached the real estate, the attachment was holden valid, on the ground, that a deed must not only be acknowledged, but that a certificate of acknowledgment must be written upon it, before it can be recorded.⁴

2. *Personal property.*—All personal property is liable to attachment, unless exempted therefrom under some of the rules of the common law, or by statute. And as these exceptions are not numerous, a statement of them, that is, of what personal property has been considered as not subject to attachment, will be the shortest method of shewing what is liable to attachment.

One general exception has been taken from the law of distress, from which, as we have seen, the right of attaching property at all, originated. As it was neces-

¹ *Kelly et ux. v. Beers*, 12 Mass. Rep. 387.

² *Bigelow v. Willson*, 1 Pick. Rep. 485, 493. *Clark v. Austin*, 2 Pick. Rep. 528. *Reed v. Bigelow*, 5 Pick. Rep. 281.

³ *Chickering v. Lovejoy et al.* 13 Mass. Rep. 51.

⁴ *Sigourney v. Larned*, 10 Pick. Rep. 72.

sary to return the property distrained to the defendant, as soon as he appeared, — the distress being merely to compel an appearance, — it followed, and was a rule, that nothing could be distrained, which could not be returned in the same plight in which it was taken.¹

Accordingly, the same rule has been applied to attachments. Thus it has been holden, that hides in a vat, in the process of tanning, could not be attached.² So it has been holden, that corn or grass standing, or other emblements, could not be attached.³

This exception, however, growing out of the law of distress, it should be remarked, was applied, while our law required the property attached to be kept by the officer, until *thirty days* after the issuing of the execution. The analogy between the cases, therefore, was sufficient to warrant the application of the same rule to both. But since an immediate sale of property attached on mesne process, has been authorized by statute,⁴ it is presumed that the rule of the common law would not be applied to the same extent as before, but that all personal property, not otherwise exempted, which can be seized, and sold under that statute, without material injury, would now be holden liable to attachment.

This presumption is strengthened by the decision in the case of *Penhallow v. Dwight*,⁵ — that corn, or any other product of the soil, raised annually by labor and cultivation, is personal estate, and liable to be *seized on execution*. Such property, when taken on execu-

¹ Gilb. on Distress, 34.

² *Bond v. Ward*, 7 Mass. Rep. 123.

³ Gilb. on Distress, 34.

⁴ Stat. 1822. ch. 93.

⁵ 7 Mass. Rep. 34.

tion, can be kept but *four* days, and now that, if attached on mesne process, it need be kept but the same number of days, it would seem to follow, that it may be so attached.¹

As to unripe corn, or any produce of the soil, before it is fit for harvest, whether growing upon the land of the debtor or another, it is very unsettled, how far it is liable to seizure, even on execution. In *Penhallow v. Dwight*, the crop taken was ripe at the time and fit to cut, and the court expressly said, that their decision would not justify an entry by the sheriff, to cut unripe corn. But our law requires property taken on execution, to be *kept* by the sheriff, and *sold* in four days. There are difficulties in the way of *keeping* any growing product of the soil, before it is ripe; and as it cannot be cut, and yet must be *sold* in four days, it is certain that nothing can be sold, but the debtor's interest in it, as it stands, — and whether such a sale can be made, has not been settled.²

Even therefore, if, since sales of property attached on mesne process are allowed, the analogy between an attachment and a seizure on execution, as to the property liable, should be admitted, there are the same difficulties, both as to keeping and selling unripe productions of the soil, on mesne process, as on execution, and, in both cases, the law is unsettled.

Hay in a barn may be attached.³

Another exception has been taken, from the peculiar nature of the property exempted from attachment.

¹ See the reasoning of the court in *Potter v. Hall*, 3 Pick. Rep. 368.

² Vide 1 Salk. 368. 1 Vent. 222. 2 Johns. Rep. 418. 3 Johns. Rep. 216. *Chapman v. Gray*, 15 Mass. Rep. 439, as to levying an execution on a term for years.

³ *Campbell v. Johnson et als.* 11 Mass. Rep. 184.

Thus *private papers* and *account books*,¹ and *choses in action*, as *promissory notes*,² have been holden not to be liable to be attached, and sold on execution.

It has not been expressly decided in our state, whether *money* in the possession of the defendant, can be attached. It was formerly doubted in England, whether it could be taken on execution;³ but it seems to be now settled, that it may be.⁴ And the reasoning of C. J. Marshall, in the case of *Turner v. Fendall*, cited in the note, though referring particularly to seizure on execution, furnishes sufficient ground for the belief, that money would now be considered as liable to attachment, on mesne process also.

It should be remarked, that the decision in *Turner v. Fendall*, is confined to money in the possession of the defendant, it being there holden, that money in the sheriff's hands, cannot be taken by him on execution.⁵ But by our statute, authorizing sales of property attached on mesne process, it is expressly provided, "that the money produced by such sale, whilst remaining in the hands of such officer, shall be liable to be further attached, as the property of the original defendant, in the same manner as the goods themselves would have been liable, had the same remained specifically in the hands of such officer."⁶

¹ *Oystead v. Shed et als.* 12 Mass. Rep. 506.

² *Maine F. and M. Ins. Co. v. Weeks and Trs.* 7 Mass. Rep. 438. *Perry v. Coates and Tr.* 9 Mass. Rep. 537. *Bowman v. Wood*, 15 Mass. Rep. 534.

³ *Armistead v. Philpot*, 1 Dougl. Rep. 231. *Fieldhouse v. Croft*, 4 East. Rep. 510. *Knight v. Criddle*, 9 East. Rep. 48.

⁴ 2 Show. 166. Dalt. Shff. 145. *Turner v. Fendall*, 1 Cranch. Rep. 117.

⁵ Vide contrary in 2 Tidd's Pract. 934.

⁶ Stat. 1822. ch. 93. s. 5.

The words of this provision, it is true, are confined to money in the officer's hands, arising from a sale of the debtor's property, which has been attached on a previous writ, and so do not meet precisely the case of *Turner v. Fendall*, where the money of the debtor, in the officer's hands, was the proceeds of an execution, previously served by him, in favor of the debtor. Whether therefore, in all cases, money in the hands of an officer, may be attached by him, on a writ against the person to whom it belongs, remains yet to be decided.

Whether *bank bills* can be attached, also remains undecided. The settlement of it, seems to depend upon the question, whether these bills are to be considered as money, or as promissory notes. If the former, they would probably be holden liable to attachment, within the rule just stated; if the latter, they would be exempted.

In *Hardwicke's cases*,¹ it is said that the sheriff cannot take bank notes, because they are, in some manner, *choses in action*. But in two cases in New York,² it has been holden, that bank bills may be taken on execution, and in one of them, that they may be attached, the court distinguishing them from *choses in action*, which, they say, cannot be seized, and treating them *civiliter*, as *money*.

But in *Perry v. Coates & Tr.*³ where the trustee disclosed certain bank bills in his possession, which belonged to the principal defendant, the Supreme Judicial Court of Massachusetts, in discharging the trustee,

¹ Hardw. Cas. 48.

² *Handy v. Dobbin*, 12 Johns. Rep. 220. *Holmes v. Nuncaster*, 12 Johns. Rep. 395.

³ 9 Mass. Rep. 537.

say, "we have decided that negotiable promissory notes, were not capable of being seized and sold upon execution; and that one possessed of such, belonging to a debtor, was not, in virtue thereof, liable as the trustee of such debtor. The bank notes in this case, are but promissory notes negotiable by delivery. The same reason applies to them. *Choses in action* are not goods, effects or credits, within the statute."¹ The bills in this case, however, had been presented to the bank which issued them, and payment of them refused, so that they could not have been current bank bills, such as an execution creditor would consent to receive.

Fixtures, which cannot be removed without injury to the estate, cannot be attached; but if they can be so removed, they may be attached.²

Whether the *franchise* of a corporation be liable to be attached, or taken in execution, seems not to have been settled.³

The defendant and a third person having made a parol contract, by which the defendant was to cultivate the land of such third person, and harvest the crop, and take one half of it himself as a compensation, and the defendant having absconded before the crop was harvested, it was holden, that he had not such an interest in the crop, as rendered it liable to attachment for his debts.⁴

¹ Vide *Jones v. Fales*, 4 Mass. Rep. 245.

² *Gale v. Ward*, 14 Mass. Rep. 352. Vide *Ashmun et al. v. Williams et al.* 8 Pick. Rep. 402.

³ *Tippets v. Walker et als.* 4 Mass. Rep. 595. But by Stat. 1810. ch. 131. the franchise of any "turnpike, bridge, canal, or other company, incorporated by law, with power to receive toll," may be taken on *mesne* process, or execution. And the statute prescribes the mode of attaching and selling the same.

⁴ *Chandler v. Thurston*, 10 Pick. Rep. 205.

The right of redeeming personal property mortgaged or pledged, is not liable to attachment, as such;¹ such interest can be reached only by the provisions of *Stat. 1829. ch. 124.* hereafter referred to.

Chattels *actually in use*, are exempted from attachment, so long as they continue so. Thus wearing apparel, when worn, cannot be attached.² So a boat, cable, or anchor, belonging to a vessel, when they are in use, and necessary to the safety of the vessel, are not liable to attachment. But when not so in use, or necessary, they may be taken.³

Whether a stage coach, when actually travelling, be liable to be stopped and attached on mesne process, is not settled. But where one was attached, about the time fixed for its departure, when part of the horses were fastened to it, and the passengers were engaged and ready to take their seats, — and another, which had been driven into the yard of the tavern, where it was accustomed to put up, at the place of its destination, but had not distributed all its passengers, — both attachments were holden valid.⁴

Certain articles of personal property have been exempted from attachment, in this Commonwealth, by statute.

By *Stat. 1805. ch. 100. s. 1.* the *wearing apparel, beds, bedsteads and bedding, and household utensils*, of any debtor, necessary for himself, his wife and children, — the *tools* of any debtor, necessary for his trade, or occupation, — the *bibles and school books*, which may be in actual use, — together with *one cow*, and

¹ *Badlam v. Tucker et al.* 1 Pick. Rep. 389.

² *Cooke v. Gibbs*, 3 Mass. Rep. 193.

³ *Briggs et al. v. Strange*, 17 Mass. Rep. 405.

⁴ *Potter v. Hall*, 3 Pick. Rep. 368.

one swine, — are altogether exempted from attachment on mesne process, or levy on execution: *Provided*, that the beds and bedding exempted, shall not exceed one bed, bedstead and necessary bedding, to two persons, and household furniture, the value of *fifty dollars*, upon any just appraisement.

Under the exemption of beds, in the above statute, it has been holden, where the debtor's family consisted of himself and wife and three small boys, that two beds only were exempted from attachment, those being all that were necessary for the family, though, if the children had been of different sexes, the case might have been otherwise.¹

Under the exemption of *one swine*, it has been holden, that a swine, when killed, is protected from attachment and seizure, as well as when alive.²

The term *tools* in the foregoing statute, it has been holden, was used to designate those implements, which were commonly used by one man, in some manual labor necessary for his subsistence, and does not extend to complicated machinery, as a *printing press*, requiring many hands to set it in motion.³

So printing-types and forms, have been holden not to be tools necessary for the trade or occupation of a printer, within the foregoing statute, and therefore are not exempted from attachment, and execution.⁴

In *Howard v. Williams*,⁵ it is said by the court, that “the design and the effect of the law are, to secure to *handicraftsmen*, the means by which they

¹ *Glidden v. Smith*, 15 Mass. Rep. 170.

² *Gibson v. Jenney*, 15 Mass. Rep. 205.

³ *Buckingham v. Billings*, 13 Mass. Rep. 82.

⁴ *Danforth et al. v. Woodward*, 10 Pick. Rep. 423.

⁵ 2 Pick. Rep. 80.

are accustomed to obtain subsistence, in their respective occupations. The exemption is not limited merely to the tools used by the tradesman, *with his own hands*, but comprises such, in *character* and *amount*, as are necessary to enable him to prosecute his appropriate business, in a convenient and usual manner; and the only rule by which it can be restricted is, that of good sense and discretion, in reference to the circumstances of each particular case. It would be too narrow a construction of a humane and beneficial statute, to deny to tradesmen, whose occupation can hardly be prosecuted at all, much less, to any profitable end, without the aid of assistants, as journeymen and apprentices, the necessary means of their employment." And accordingly, where the debtor himself worked on watches, and his apprentice or journeyman on jewelry, and the jury found the debtor's principal business, was that of a jeweler, — it was holden, that the tools used by the apprentice or journeyman, were exempted.

Whether, if a debtor have two distinct trades, his tools used in both be exempted from attachment, and if not, whether he, or the officer may elect which tools shall be attached, is left undecided, by the case last cited.

Implements of husbandry, necessary for tilling land, are not, within the *Stat.* 1805. *ch.* 100. exempted from attachment, or seizure on execution.¹

By *Stat.* 1813. *ch.* 172. *six sheep*, not exceeding the value of *thirty dollars*, and *two tons of hay*; by *Stat.* 1817. *ch.* 108. *one iron stove*, for each building occupied by the debtor or his family, and used exclusively for warming the building;—and by *Stat.* 1822.

¹ *Daily v. May*, 5 Mass. Rep. 313.

ch. 93. s. 8. a tomb, in use as a cemetery for the dead; are exempted from attachment, and seizure on execution.

By *Stat. 1832. ch. 58. fuel* of the value of *ten dollars* or less, belonging to any householder, and procured and designed for the use of such householder, in his family, is exempted from attachment on mesne process, and execution.

SECT. III. WHAT CONSTITUTES AN ATTACHMENT OF REAL ESTATE.

In order to attach real estate, upon a writ of mesne process, it is not necessary that the officer should view, or enter upon, the land. "The attachment of real estate upon mesne process," says C. J. Parker, in the case of *Perrin v. Leverett*,¹ "is with us, almost entirely symbolical. The tenant is never dispossessed by it. The officer may go upon the land, in the dead of night, attach the land and return his precept; and without any act of notoriety whatever, and indeed, with the writ in the officer's pocket, until the return day, a lien is created in favor of the attaching creditor. Nay more, if he never set foot upon the land, but make a return, that he has attached it, there seem to be no means of questioning the fact."

A simple return, therefore, by the officer, that he has attached the real estate of the defendant, is sufficient. And, in practice, the officer simply minutes upon the writ, as soon as it is put into his hands, the exact time of his receiving it, and in the most general

¹ 13 Mass. Rep. 128.

manner, the estate attached; and if the return be subsequently made up, and the summons served in proper season, all the estate specified in the return, is considered as having been attached at the time of the original minute upon the writ. Some such memorandum as the above, however, must always be made by the officer, at the time he receives the writ.

As the officer does not take or keep possession of the land, it may be attached by other officers, and each attachment will take effect, in the order of time, in which it is made, subject to the rights of any previous attaching creditors. The same land, therefore, may be attached, at the same instant of time, upon different writs, by two different officers. And as the title, which each creditor would obtain, under a levy upon the real estate so attached, would be good, were it not for the other, — they become, by the levy of their executions, tenants in common of the land.¹

Pews. By *Stat.* 1795. *ch.* 53. all pews, and rights in houses of public worship, shall be considered as real estate. And by *Stat.* 1822. *ch.* 93. *s.* 7. it is provided, that whenever a pew shall be attached, or taken in execution, notice thereof shall be given in writing, by the attaching officer, to the clerk of the parish or religious society, holding the church or meeting-house, in which such pew is situated, or left at his dwelling house, or usual place of abode.

And for the attachment of a pew in a meeting-house, upon mesne process, it is not necessary for the officer to enter the house.²

¹ *Shove v. Dow*, 13 Mass. Rep. 529. *Watson et al. v. Todd et al.* 5 Mass. Rep. 271.

² *Perrin v. Leverett*, 13 Mass. Rep. 128.

By *Stat.* 1798. *ch.* 42. however, all pews, and rights in houses of public worship in *Boston*, shall be considered and deemed in law, to be personal estate. The *Stat.* 1822. *ch.* 93. before cited, as to the mode of attaching pews, applies to pews in Boston.

And in all cases of the attachment of pews, the notice to the clerk of the parish, is a part of the *attachment*, and does not supersede the necessity of serving the common summons upon the defendant, as in other cases.

We have before observed, that an attachment of real estate, constituted merely a lien upon the land, and the title is perfected, only by a levy under the execution, which may issue upon the judgment, recovered in the suit. Such attachment, therefore, is no bar to any alienation of the land attached, subject, however, to the lien created by the attachment. But to make this lien complete, the service of the writ must be completed by the delivery of a summons, which may be done, at any time after the attachment, provided it be within the time limited by law, for the completion of the service, — and in such case, it will relate back to the time of the attachment.

SECT. IV. WHAT CONSTITUTES AN ATTACHMENT OF PERSONAL ESTATE.

To constitute an attachment of personal estate, the attaching officer must have the actual possession and custody of the property attached, as much as in seizure

¹ *Almy et al. v. Wolcott*, 13 Mass. Rep. 73.

on execution.¹ It seems, that going on board a ship, in which there are goods of the debtor, but not breaking open the hatches, where the goods are stowed, is not such a possession by the officer, as to make a valid attachment.²

It is not necessary, that the goods should be removed from the place where they are attached,³ or that every article should be taken hold of, by the officer. It is sufficient, if he be in view of the whole, with the power of actually seizing them.⁴ Even the use, by the debtor or his family, of such articles, as will not be injured by use, if by the permission of the officer or his servant, will not vacate the attachment, provided there be a keeper over them, or that there be any other acts of notoriety, which may notify creditors, that the goods are in the custody of the law.⁵

The debtor, however, should not have the management of such property, in the same manner as if no such attachment had been made, but some person must be authorized and required, where actual possession is not kept, to give notice, in case a second attachment is attempted.⁶

Locking the door of the room of a building, containing the property of the debtor, and taking the key, is a sufficient possession and custody, to constitute and preserve a lawful attachment, although the debtor may

¹ *Lane et al. v. Jackson*, 5 Mass. Rep. 157. *Watson et al. v. Todd et al.* 5 Mass. Rep. 271.

² *Ibid.* But vide *Naylor et al. v. Dennie*, 8 Pick. Rep. 198.

³ *Train v. Wellington*, 12 Mass. Rep. 495.

⁴ *Ibid.* 16 Johns. Rep. 288.

⁵ *Ibid.* *Baldwin v. Jackson*, 12 Mass. Rep. 131. *Merrill v. Sawyer et al.* 8 Pick. Rep. 397.

⁶ *Bridge v. Wyman et al.* 14 Mass. Rep. 190. *Bagley v. White*, 4 Pick. Rep. 395.

have another key by which he may gain access to the store.¹

Although attachments of personal property, are not generally, valid against subsequent purchasers or attaching creditors, unless the officer take possession of the property attached, yet property of the nature of things immoveable, is not within the reason of the general rule, and is consequently, to be excepted from its operation. As for instance, in the case of *Ashmun et al. v. Williams et al.*,² where a building, used as a town-house, the property of one *Damon*, was attached, the fee of the land being in the town, it was considered by the court, that taking possession by a notorious act of the officer, was not necessary; but that the simple return of the attachment, made upon the writ, was sufficient.

The officer, having once taken the requisite possession of the property, upon the first writ served, may return subsequent attachments of the same property, upon other writs, in favor of the same or other creditors, so long as his actual or constructive possession continues;³ and no overt act is necessary, to constitute such subsequent attachments.⁴ But if such actual or constructive possession of the goods by him, have been in any way lost, he cannot again attach them, without an actual seizure.⁵

¹ *Denny v. Warren*, 16 Mass. Rep. 420. *Gordon v. Jenney*, 16 Mass. Rep. 465.

² 8 Pick. Rep. 402.

³ *Turner v. Austin*, 16 Mass. Rep. 181. *Vinton v. Bradford*, 13 Mass. Rep. 114.

⁴ *Ibid.*

⁵ *Knap v. Sprague*, 9 Mass. Rep. 258. *Carrington et al. v. Smith*, 8 Pick. Rep. 419.

From the rule, that possession of the goods must be taken and kept by the attaching officer, it follows, that goods in the possession of one officer, by virtue of an attachment, cannot be attached, at the suit of another creditor, by another officer.¹ And different deputies of the same sheriff, are different officers, within this last rule.²

If a second deputy, therefore, come to attach property, and find it already in legal custody, he is bound in duty, to deliver his precept to the one, who has the goods, and require him to attach. If he do not, he is guilty of a breach of duty, for which he will be responsible.³ And if instead of so doing, he seize the property, he is liable to an action by the first attaching officer.⁴

If however, the first attaching officer be a constable, and the second who comes, be a deputy sheriff, with a writ beyond a constable's jurisdiction, it seems that the constable must either select a sufficient amount, to satisfy his attachment, and leave the residue for the deputy, or if that be impossible, by reason that the property is indivisible, or from any other cause, he must surrender the property, and give his writ to the deputy, who will be bound to give it priority over his own writ, in the order of attachments.

This rule, that different officers cannot attach the same property, at the same time, applies only to cases, where possession must be taken, to constitute a valid attachment. Thus, we have seen, it does not apply

¹ *Watson et al. v. Todd et al.* 5 Mass. Rep. 271. *Vinton v. Bradford*, 13 Mass. Rep. 114. *Thompson v. Marsh et al.* 14 Mass. Rep. 269.

² *Thompson v. Marsh et al.* 14 Mass. Rep. 269.

³ *Ibid.*

⁴ *Ibid.*

to attachments of real estate.¹ So also, shares in the stock of incorporated companies, and equities of redemption, may be attached on different writs, by different officers.² So where goods have been attached by a trustee process, in the hands of a trustee, another officer may make a second attachment of the same goods, by the ordinary process of law, and hold them, subject to the lien created by the first attachment.³

We have already seen, that in all cases where an attachment of property is made upon a *capias* and attachment, whether really or nominally, a delivery of the summons is necessary, at some time within the period prescribed by law, for the service of the writ.⁴ And several attachments of different property, may be made on the same writ, *before* the delivery of the summons, and that too, in different counties, or towns.⁵

Whether additional property can be attached upon a writ, *after* the summons has been served upon the defendant, does not seem to have been decided in our courts. In the case of *Cleverly v. Brackett et al.*⁶ the judge at the trial ruled, that a further attachment might be made, after the delivery of the summons, if sufficient had not been taken before, but the decision of the case by the whole court, turned upon other points.

Shares in incorporated companies. The shares or

¹ Vide ante Sect. II. of this Chapter.

² *Denny v. Hamilton*, 16 Mass. Rep. 402.

³ *Burlingame v. Bell*, 16 Mass. Rep. 318.

⁴ Vide ante page 154, 155.

⁵ Vide ante Chap. VIII. Sect. II.

⁶ 8 Mass. Rep. 150.

interest of any debtor, in a corporation created *before* the passage of the *Stat.* 1804. *ch.* 83. whatever provision upon the subject there may be in the act of incorporation, can only be attached, pursuant to that statute, by having an attested copy of the writ left by the officer holding the same, with the clerk and treasurer, or cashier of such corporation.¹ This service of a copy of the writ upon an officer of the corporation, constitutes the *attachment*, the property itself not being tangible. The common summons must still be served upon the defendant, in the same manner, as if any other property of his had been attached. But shares in corporations, created *since* *Stat.* 1804. may be attached, in the manner prescribed in the respective acts of incorporation.²

Personal property owned in joint-tenancy, — tenancy in common, or copartnership. — If a chattel be owned by the defendant, as a joint-tenant or tenant in common with others, the whole chattel must be attached on the writ against the defendant, though his interest in it only, can be sold on the execution.³

In like manner, as partnership effects may be attached by a creditor of one of the firm, and the attachment is good against all persons but the creditors of the firm, — on a writ against one of the firm, the officer should attach the whole property, but sell only the defendant's share.⁴

So if the goods of a stranger be so mixed with those

¹ *Howe v. Starkweather*, 17 Mass. Rep. 240.

² *Tilcomb v. Union Mar. and Fire Ins. Co.* 8 Mass. Rep. 326.

³ *Gardner v. Dutch*, 9 Mass. Rep. 427. *Page v. Weeks*, 13 Mass. Rep. 199. *Melville v. Brown*, 15 Mass. Rep. 82.

⁴ *Pierce v. Jackson*, 6 Mass. Rep. 242. *Phillips et al. v. Bridge*, 11 Mass. Rep. 242.

of the defendant, that the officer cannot distinguish them, he may attach the whole; and he will not be liable to an action, unless, upon notice and demand by the stranger, he refuse or delay to deliver him his part of the goods attached.¹

Personal property mortgaged or pledged. Any personal property, not exempted by law from attachment, which is mortgaged, pledged, or subjected to any lien created by law, may be attached, in a suit against the mortgagor or pledgor, unless the title of the mortgagee, pledgee or holder, have become absolute; provided the person in whose favor the attachment is made, shall pay or tender to the mortgagee, pledgee or holder, the amount of the demand for which the property is mortgaged or pledged.² The attachment of property thus situated, is made by the officer, in the same manner as in common cases, the payment or tender having been first made by the plaintiff, or by the officer in his behalf.

It may be remarked, that the interest of the mortgagor or pledgor in the property mortgaged or pledged, may also be reached, by a trustee process served upon the mortgagee or pledgee.³

The attachment of personal property on mesne process, made in the manner which has been stated, was originally in the nature of a distress; the property, therefore, must have been kept in the officer's possession, and could not be sold, until it was seized on execution.

¹ *Bond v. Ward*, 7 Mass. Rep. 123. *Shumway et al. v. Rutter*, 8 Pick. Rep. 443.

² Stat. 1829. ch. 124. s. 2. Vide *Badlam v. Tucker*, 1 Pick. Rep. 389.

³ Stat. 1829. ch. 124. s. 1.

But by *Stat. 1822. ch. 93.* it has been provided, that all personal property attached on mesne process, on one or more writs, may be sold by the consent, in writing, of the respective parties, at any time before judgment. The sale is to be conducted in the same manner, as a sale of property on execution, and the proceeds, deducting all lawful charges, are to be holden and retained by such officer, in the same way, and for the same purposes, that the specific property would have been holden.¹

And whenever any live stock, goods, chattels or merchandize, the keeping of which would be troublesome or expensive, shall be attached on mesne process, other than process issued by justices of the peace, and the parties do not consent in writing, to a sale thereof, before judgment, either party may apply to the attaching officer, to have such property examined and appraised; and the officer having given notice of such application to the opposite party, and having made an inventory of the property, is to cause the same to be examined and appraised, by three discreet and disinterested persons, chosen in the same manner, that appraisers are chosen, in levies of executions upon real estate. The appraisers are then to examine the property, and to certify whether the property is perishable, troublesome, or expensive to keep; and if a major part of them do so certify, they are then to appraise the same at the cash value, at the time of appraisal, and the officer is then to cause the property thus certified and appraised, to be sold in the same manner, in which property seized on execution is sold, and the proceeds to be applied in the same

¹ Sect. 1.

way, that the property would have been, if no sale had taken place.¹ The sale, however, may be prevented, and the property restored to the debtor, at any time before the sale thereof, on his giving bond to the sheriff, if the attachment were made by him, or his deputy, otherwise to the coroner or constable, making the same, in a sufficient penalty, with two sufficient sureties, conditioned to satisfy the judgment or judgments, which may be recovered in suit or suits, in which the property was attached, or to pay over the appraised value of the property towards the satisfaction of the execution or executions, which may be issued thereon, to any officer, to whom the same may be committed, in the same order and under the same circumstances, that the property itself would be applied.² This bond, the officer is to return with the writ, on which the first attachment is made, and the creditors are entitled to the same remedies upon it, as are given on probate bonds; or the parties may have a *scire facias*, as against bail, in which they may join, or sue separately, at their election.³

Subsequent attachments of the avails of such property may be made in the same manner, in which the property itself might have been attached, and the lien upon the avails continues for thirty days after judgment, and if not then demanded by the creditor, at whose suit the property was attached, they are to be restored to the debtor.⁴

The personal property, which has been attached, or its proceeds, when sold, pursuant to the foregoing

¹ Sect. 2.

² Sect. 3.

³ Sect. 4.

⁴ Sect. 5.

statute, will remain in the hands of the officer, to satisfy the executions which may issue, unless before the property or proceeds shall have been actually taken in execution, the defendant die, in which case, if any will of his shall be found, and letters testamentary issue thereon, or administration on his estate be granted within this Commonwealth, the attachment shall be dissolved, and the property, or its proceeds, if sold, shall be accounted for and delivered up to the executor or administrator of such defendant.¹

If property have been attached by the same officer, on two or more writs, and a sale of it be made on the first one, for more than enough to satisfy that demand, the officer may retain the residue of the money in his hands, to satisfy the demands, upon which it was subsequently attached.

¹ Sect. 6.

CHAPTER XIV.

SERVICE OF A SUMMONS AND ATTACHMENT.

The writ of summons and attachment is also served, by attaching property and summoning the defendant.

The rules as to the attachment of property upon this writ, are precisely the same as those which have been stated in the preceding chapter.

As to the mode of summoning the defendant, there is a diversity among the cases in which this writ is the proper one to be used, which distinguishes the mode of service of this writ, from that of a *capias* and attachment.

We have seen that the trustee process is substantially a summons and attachment,¹ and that the cases, in which the summons and attachment is the proper form of writ to be used, are against corporations and bodies politic, sheriffs, executors, administrators, and females, on demands under *ten dollars*, and in debt on a judgment, upon which execution has been issued, — where it is intended to attach property, either really or nominally.²

Trustee process. In the case of the trustee process, the writ of summons and attachment is served in the same manner as an original summons, that is, by reading, or by an attested copy of the writ itself. The

¹ Vide ante Chap. X. Sect. V.

² Vide ante Chap. VII. Sect. IV. page 60.

common summons is never used. This mode of service by reading, or copy, is used in this case, because, it is expressly required by *Stat. 1797. ch. 65.* authorizing the use of the trustee process. In fact, it is the service of the writ in this mode, upon the trustee, which constitutes the attachment of the property of the principal debtor, in his hands, no actual seizure of it being made by the officer. And as to the principal defendant, the statute above named requires the same mode of service, upon him.

It may be remarked, that by a trustee process, not only may the defendant's property in the hands of the trustee be attached, by the mode of service above named, but the officer may upon the same writ, attach other property of the defendant, if to be found, by an actual seizure of it, as in common attachments. But still, in all cases, whether such additional attachment be made or not, the trustee process must be served, both upon the trustee and the principal defendant, by reading or by copy.

Against corporations. In like manner, where the writ of summons and attachment is used against corporations, or bodies politic, the writ must be served by reading or by copy, in the manner of an original summons, because it is expressly required by statute.

In other cases. But in the remaining cases, where the writ of summons and attachment may be used, as there are no special statutory provisions in regard to them, like those in the two preceding cases, there seems to be no reason why the general direction of *Stat. 1797. ch. 50. s. 1.* "that when the goods or estate of any person shall be attached at the suit of another, in any civil action, a summons, in the form

prescribed by law, shall be delivered to the party whose goods or estate are attached, or left at his or her dwelling house, or place of last and usual abode," &c. should not apply. Under this provision, the common summons is used, where property is attached by a *capias and attachment*, and it would seem that it should also be used, when an attachment is made upon a writ of *summons and attachment*, in those cases, where another mode is not specially prescribed.

Care should be taken in these cases, however, not to confound the *original summons* with the *summons and attachment*. Either of them may be used, as has already been seen, but the former is served simply by reading, or by a copy of the writ itself, — and the latter, by an attachment of property, either real or nominal, and by leaving the common summons.

The *common summons*, when used with a writ of *summons and attachment*, must be filled up, and served, in the same manner, as when used with a writ of *capias and attachment*, and which was stated in the preceding chapter.

CHAPTER XV.

BAIL.

SECT. I. OBJECT AND NATURE OF BAIL.

Connected with the subject of the service of a writ as a *capias*,¹ is that of bail, for after the command in the writ to take the body of the defendant, follows the further direction to the officer, “*and him safely keep.*”

The officer, therefore, is bound to *keep*, as well as to arrest the defendant. And one method of doing this, is, by committing him to the county gaol, which method the officer may, and for his own safety and convenience, will adopt, unless the defendant avail himself of the privilege of giving bail.

The term “*bail*,” is derived from the French “*bailler*,” to deliver, the defendant being delivered to his bail, by the sheriff.

Bail, therefore, arises out of the duty of an officer to *keep* the person whom he has arrested, and is a substitute, created by law, for actual imprisonment. The bond is taken for the sheriff’s indemnity, and is given for the defendant’s convenience. Its *object* is, to insure the defendant’s appearance in the suit, and performance of the judgment, without subjecting him to actual custody :— and in its *nature*, it is a certain form of security established by law, to effect those

¹ Ante Chap. XII.

purposes; of which, by complying with its conditions, the defendant may avail himself, as a matter of right.

So that the command to the officer in the writ, in connexion with the right of bail, is “to arrest the defendant, and him safely keep, either by detaining him in actual custody, or by taking from him a legally established bail bond, as the defendant himself may elect. If he offer you such a bond, you *must* accept it, and discharge him from custody. And if you take such a bond, legal in all respects, you are no further responsible.”

SECT. II. ORIGIN OF THE RIGHT OF BAIL.

At common law, the sheriff was not obliged to let the defendant to bail, on mesne process, but might keep him until he procured his release by a writ of *mainprize*.¹ But he might let him to bail, though if he did so, he was himself responsible.

This right of the defendant in civil actions, to be admitted to bail on mesne process, and the consequent obligation of the officer, to discharge him from arrest, when proper security is offered, are founded upon the English *Stat. 23. Hen. 6. c. 10*:² — which, though

¹ 1 Vent. 85. 3 Black. Comm. 128. 6 Bac. Abr. 179.

² This Stat. being the foundation of the law of bail, in this country, the words of its provisions are here given:—

“That every sheriff and other officer, shall let out of prison, all persons by them arrested, or in their custody, by virtue of process in any personal action, upon reasonable sureties, of persons having sufficient within the county, where the persons be so let to bail, to answer according to the exigency of such process except persons so in prison by condemnation, execution, *capias*, *utlagatum*, or by special order of any court or justices: and no sheriff or other officer shall take any obligation for any cause aforesaid, or by color of their office, but only to them-

never re-enacted, has been virtually adopted, in this state, as part of the common law, modified, however, in some degree, as to the mode of taking and the effect of bail, by our own statutes.¹

SECT. III. PROCESS OF BAIL.

1. *In England.* The practice in this state, in taking bail, is different from that in England. *There*, upon an arrest, the defendant, in the first place, gives bail to the sheriff, by *bond*, conditioned simply, that he shall appear according to the exigency of the writ, upon its return day, or within four days afterwards. This is called *bail below*. He then appears accordingly, by putting in bail to the action, which must be done by way of *recognizance*, before the court or some judge, or a commissioner, conditioned, that the principal shall pay the debt, or surrender his body to be taken in execution, or that the debt shall be paid by the bail. This latter process of bail by *recognizance* is entirely distinct, though the persons becoming sureties may be the same, from that at first given to the sheriff by *bond*, and is termed, *bail to the action*, or *bail above*. If the plaintiff be dissatisfied with the bail above thus offered, he may compel them to *justify*, that is, to shew that they have sufficient within the county, to respond the judgment:—if they do this, and are accepted, then, as also, when they are at

selves, and by the name of their office, and upon conditions written, that the prisoner named therein, shall appear at the day and place required in the said process: and if any sheriff or other officer, take any obligation in other form, by color of their offices, it shall be void.”

¹ *Sparhawk v. Bartlett*, 2 Mass. Rep. 188, 194. Stat. 1784. ch. 10.

once admitted by the plaintiff, without being required to justify, the defendant is said to have put in and perfected bail above.¹

In the English practice, therefore, there are two processes of bail, — the first, or the *bail below*, given by bond to the sheriff, simply as security, that the defendant shall appear : — the second or the *bail above*, put in after the return day of the writ, by recognizance before the court, and conditioned that the defendant shall abide the judgment and not avoid, and the putting in of which, constitutes the appearance, and is thereby a compliance with the condition of the first bond.

And the remedies of the plaintiff, are conformed to this practice of giving bail, in England. If the defendant, after giving bail below, do not appear, by putting in and perfecting bail above, the plaintiff may either take an assignment of the first bail bond, from the sheriff,² which assignment the sheriff is bound to make, and for refusing which, he is liable to an action upon the case,³ and may maintain an action of debt thereupon, against the sheriff's bail, in his own name ;, by doing which, however, he discharges the sheriff, provided the bond be valid :⁴ — or if he be dissatisfied with the sheriff's bail, he may proceed against the sheriff himself, by calling upon him to return the writ, and afterwards, to bring in the body of the defendant.

¹ 1 Arch. Pract. 81, 101.

² 1 Arch. Pract. 93.

³ Ibid. *Mendez v. Bridges*, 5 Taunt. Rep. 325.

⁴ 1 Arch. Pract. 94.

⁵ Ibid. 88, 94. *Etherick v. Cowper*, 1 Salk. 99. *Grosvenor v. Soame*, 3 Salk. 57.

And if the sheriff do not then cause sufficient bail to be put in and perfected above, he will himself be responsible to the plaintiff, for the whole amount of the debt.¹ But he will have his remedy over against the bail he took, upon their bond.²

If, however, the defendant do appear, and put in and perfect bail above by recognizance, the recognizance becomes a matter of record, and the bail below and the sheriff are entirely discharged: and the duties and liabilities of the bail above, thus taken, are similar to those of bail in this state, for it has been decided, that nothing is a breach of the *bail bond*, taken in this state, which is not also a breach of the condition of the *recognizance* of bail in England.³

2. In *Massachusetts*. In the practice in this state, there is but one bail bond taken, and that, either by the officer who serves the writ, at some time after the arrest, and before commitment, — or after commitment, by the gaoler. But the bail thus taken, answers all the purposes, both of the bail below, and the bail above, in England.

It resembles the bail below, — in being given by bond, — to the sheriff — and before the return day of the writ; in the condition, being for the defendant's appearance on that day, to answer the suit, — and in the fact, that the bond taken, does not become a matter of record. It resembles both bail above and bail below, in the number of sureties required, they being alike in this particular. And it resembles bail above, in being also conditioned, that the defendant shall abide the judg-

¹ 1 Arch. Pract. 87, 101.

² Ibid.

³ Ibid. *Champion v. Noyes*, 2 Mass. Rep. 481.

ment and not avoid, — and in the circumstance, that the sureties are not liable, until judgment has been obtained against the defendant, and “*non est*” been returned on the execution against him. As to the *sheriff’s* liability, he, as in taking bail below in England, is liable for taking insufficient bail, but not at the same time, or in the same manner. In our practice, like the sureties, he is not liable, until after a return of “*non est*,” against the defendant, and not then, or at all, unless he has failed in some respect, to comply with the law, in taking the bail bond.

A bail bond *here*, therefore, is like that of *bail below*,

1. In the *kind of instrument* taken.
2. In the *time* when it must be given.
3. In the *person* to whom it must be given.
4. In the *disposition* of the bond.

It is like, or unites both the bond of *bail below*, and the recognizance of *bail above*,

1. In the *number* of sureties required.
2. In the *conditions*.

It is like the recognizance of *bail above*,

1. In the *time* of the sureties’ liability.
2. In the *amount* of their liability.

The *amount* of the *sheriff’s* liability here, is the same as in taking *bail below*, but the *time* and *manner* of enforcing that liability, are unlike the English practice.

The process of taking bail, therefore, in the practice of this state, is this ; — At any time after an arrest, and before the return day of the writ, the officer or gaoler, if the defendant elect, and take the proper steps, accepts a bail bond, executed according to law, and conditioned, that the defendant shall appear to answer

the suit, and shall abide the judgment and not avoid.¹ This bond, the officer may, and generally does retain, in his own possession, until it is called for. The plaintiff then pursues his original action to judgment, whether the defendant appear or not, and takes out his execution. When this execution is returned "*non est*," and usually not before, the plaintiff calls upon the officer, for the bail bond that was taken. The officer delivers this bond to the plaintiff, who, if the officer have done his duty faithfully in taking bail, has no resource but to the sureties in the bail bond, by action of *debt* or *scire facias*. But if the officer have not done his duty, the plaintiff may resort to him also, *by action on the case*.

SECT. IV. PROCEEDINGS AND REQUISITES IN TAKING BAIL IN MASSACHUSETTS.

When the officer has arrested the defendant, he can at once commit him to gaol, and leave him, to give bail to the gaoler, who is also a deputy of the sheriff, after commitment, if he intend giving bail;—for as the officer, after he has arrested, must, at his peril, keep the defendant, he is not obliged to incur the risk of an escape, or a rescue, by waiting for, or going with, the defendant, to obtain the requisite sureties. For the same reason, even if the requisite sureties are at hand, the officer is not obliged to wait until the bond is filled up and executed, but may commit the defendant, and leave him to give them as bail, to the gaoler, afterwards. But if the defendant, as soon as he is

¹ Stat. 1784. ch. 10.

arrested, should tender to the officer a legal bail bond, properly executed, — in that case, as he could incur no danger, the officer could not commit him, but would be bound to accept the bond, and to discharge him, at once, from custody. In the other cases, however, the officer, though not bound to do so, usually does give the defendant, before committing him, reasonable time and opportunity to procure his sureties, and the execution of the bond.

In all cases, whether the bail be given to the officer, who serves the writ, before commitment, or to the gaoler, afterwards, — both for the sheriff's indemnity, and for the discharge of the defendant, all the requisites of law, in relation to the bail bond, must be complied with.

1. *The instrument required.* The security taken must always be by *bond*. If given even to the proper person, by any other instrument or in any other form, the proceedings would be absolutely void;¹ the sureties would not be holden, and the sheriff would be liable, as for taking no bail.

This, however, applies exclusively to security given to the sheriff, and does not extend to such as may be given to the party; for though the sheriff is by the statute confined to a particular form, the party himself is not.² But giving security to the party, is not giving bail.

The officer usually furnishes the blank bond and fills it up, though he is not bound to do either, but may leave the defendant to procure his own bond. If however, the officer offer, and the defendant permit

¹ *Rogers v. Reeves*, 1 Term. Rep. 418.

² *Ibid.* *Hall v. Carter*, 2 Mod. Rep. 304.

him, to furnish and fill up the bond, he must pay him his legal fee therefor, before he can be discharged.¹ But the defendant is not obliged to take this course, for if he should himself procure, and cause to be executed, a proper and sufficient bond, and tender it to the officer, the officer would be bound to accept it, without charging his fee.

2. *To whom the bond must be given.* The bond, to be a proper bail bond, must, when taken by the sheriff, or his deputy, or by the gaoler, be given to the sheriff of the county, in which the arrest is made, by his name of office; — and when taken by a coroner or constable, to himself, by his name of office, and never to the plaintiff, or to the deputy who serves the writ. If given to the plaintiff, it would be void as a bail bond, though he might recover on it, as upon a common bond: — if given to a deputy, or to the gaoler, it would be void altogether.²

3. *Form and condition of the bond.* The *obligatory* part of the bond is like that of a common bond.

The *conditional* part of the bond, generally contains, in the first place, a recital of the name and arrest of the defendant, the name of the plaintiff, at whose suit the arrest is made, the amount of the debt or damage demanded, the nature of the suit, the date of the writ, and when and where it is returnable. All these circumstances are essential to be stated, though strict accuracy in setting them forth is not required.³ Yet as they must appear *substantially*, somewhere in the

¹ By Stat. 1795. ch. 41. the sheriff's fee for furnishing and preparing a bail bond, is *twenty cents*, to be paid by the person admitted to bail, and taxed for him, if he prevail, in the bill of costs.

² Stat. 23. Hen. 6. ch. 10.

³ *Colburn et al. v. Downes*, 10 Mass. Rep. 20.

bond, to give it validity,¹ they are usually set forth in this way of recital, in the condition.

After this recital, the condition of the bond must be *solely*, that the defendant shall appear at the time and place named in the writ, to answer the plaintiff's suit, and shall abide the order and judgment of court thereon, and not avoid. If the bond contain any other or further condition, it is void.²

4. *Penalty of the bond.* As far as the officer is concerned, he must hold the defendant to bail in that sum, to the amount of which, he is commanded in the writ, to attach property. And therefore, this amount always governs that of the penalty in the bond.

If however, the plaintiff, in his writ, should direct an attachment to an unreasonable amount, and the officer be thereby obliged to commit the defendant for inability to procure bail in such a sum, the court will relieve upon *habeas corpus*, and reduce the sum; for the Constitution of Massachusetts³ provides, that excessive bail shall not be demanded. But the officer may, and for his own security, must fix the penalty of the bond, at the sum named in the writ, for attachment.

5. *Principal in the bond.* The defendant who is arrested, must always be the principal in the bond, and must sign and seal it, as such. If it be not so executed by him, though properly executed by the sureties, it will be void.⁴

6. *Sureties in the bond.* The bond should also be executed by at least *two* sureties, having sufficient

¹ *Churchill v. Perkins et al.* 5 Mass. Rep. 541.

² *Rogers v. Reeves*, 1 Term. Rep. 418. Stat. 1784. ch. 10. s. 1.

³ Part. 1. Art. 26. *Jones v. Kelly*, 17 Mass. Rep. 116. *Whiting et al. v. Putnam et al.* 17 Mass. Rep. 175.

⁴ *Bean v. Parker et al.* 17 Mass. Rep. 591, 604.

within the county, to respond the judgment, which may be recovered.

The defendant is bound to procure, and, of course, the officer has a right to demand, at least *two* sureties, because the statute, giving the right of bail, speaks of “*sureties*.”¹ The acceptance, however, of a single surety by the officer, does not make the bond void, but renders him liable, as will be considered hereafter.

It is not necessary that the sureties offered or taken, should *reside* within the county; for the statute only requires, that they should *have* sufficient within the county.²

The sureties also, must be “*reasonable*” sureties.³ So that infants, *femes covert*, persons *non compos*, or any persons, who would not be liable, and against whom an action could not be maintained on the bond, are not such, as an officer would be either bound to accept, or justified in taking.

No counsellor or attorney of the Court of Common Pleas, can be bail in any cause pending in that court, on pain of being stricken from the rolls.⁴

7. *Time when bail may be taken.* The defendant, by complying with the requisitions on his part, may be admitted to bail by the officer who serves the writ, at any time after arrest and before actual commitment:— and after commitment and before the return day of the writ, by the gaoler.

Bail cannot be taken, after that time, because the

¹ 23 Hen. 6. ch. 9. *Long v. Billings*, 9 Mass. Rep. 479. *Rice et al. v. Hosmer*, 12 Mass. Rep. 127.

² Vide ante page 182, note 2.

³ Stat. 23. Hen. 6. ch. 9

⁴ 21st Rule of C. C. Pleas. Appendix B.

officer is commanded in the writ, to return it on that day, with his doings thereon : — and after such return, nothing further can be done in the service of it.

8. *Disposal of the bail bond.* The officer is not bound to return the bail bond into court, or to file it in the clerk's office, nor is it customary for him to do either, for the bail bond, in our practice, never becomes a matter of record.¹ He usually retains it in his own possession, until it is called for by the plaintiff. And as the plaintiff can make no use of it, until after a return of "*non est*," on the execution against the principal, he seldom sees the bond, or demands it, until that time.²

If these requisitions are complied with, on the part of the defendant, the officer is bound to admit him to bail, and for refusing, is liable to the defendant in an action on the case. If they be complied with, and the defendant be admitted to bail, the officer is no further responsible. But if the officer admit the defendant to bail, without enforcing all these requisitions, he becomes liable to the plaintiff, as will be considered in its proper place.

¹ *Bean v. Parker et al.* 17 Mass. Rep. 591.

² *Ibid.*

CHAPTER XVI.

RETURN OF THE WRIT BY THE OFFICER, WITH
HIS DOINGS.

After the writ has been served in one of the ways before mentioned, and on, or before the return day named therein, it is the duty of the officer, to make a return of it, with his doings thereon, to the court or justice, from whom it issues. This is done in pursuance of the last command in the writ; and strictly, the officer should return it directly to the court, that is, to the clerk's office, or to the justice; but by the practice in many counties, he returns it to the attorney, from whom he received it.

The return of the officer's doings, should be in writing upon, or annexed to, the writ, and be signed by him. It must specially state the manner in which he has served the writ, and should specify all the facts necessary to shew, that he has duly served it.¹ And the written return should set forth the whole of his doings, for it is a general rule, that parol evidence cannot be admitted, to contradict or explain an officer's return.²

The officer's return should also state the amount

¹ *Slayton v. Chester*, 4 Mass. Rep. 478. *Bott v. Burnell*, 9 Mass. Rep. 96. *Same v. Same*, 11 Mass. Rep. 163. *Gardner v. Hosmer*, 6 Mass. Rep. 325. Vide *Wellington v. Gale*, 13 Mass. Rep. 483.

² *Ibid.* *Davis v. Maynard*, 9 Mass. Rep. 242. *Purrrington v. Loring*, 7 Mass. Rep. 388. *Bean v. Parkér et al.* 17 Mass. Rep. 591. *Ingersoll v. Sawyer*, 2 Pick. Rep. 276.

of his fees for the service of the writ, and the items of charge, or he will not be entitled to them.¹ And if he claim *extra* compensation in serving a precept, for removing or keeping property, he must return a bill of particulars of the expenses, together with his affidavit, that such expenses were actually incurred, and that the charges are reasonable, — or they will not be allowed.²

Amendment of return. An officer can never falsify his return upon a writ, to protect himself:³ — nor will he, after having returned his precept, be permitted to alter or amend his return, so as to affect the rights of others, who are not parties.⁴

But an officer will be permitted to alter or amend his return, according to the truth, where the rights of others are not concerned, at any term after it is made, upon motion.⁵

The precept of the writ directs the officer to make a return thereof at a time specified. It might be a question, whether he ought not to write the return, as soon as he has made the service, that, in case of his death, the service may be of record. In cases of attachment, where writs are frequently in the officer's hands, for long periods, it would be well to have complete memoranda made on the writ, at the time.

¹ Stat. 1795. ch. 41. s. 1.

² 30th Rule C. C. Pleas. Appendix B.

³ *Weld v. Bartlett*, 10 Mass. Rep. 470. *Simmons v. Bradford*, 15 Mass. Rep. 82.

⁴ *Williams et al. v. Brackett*, 8 Mass. Rep. 240.

⁵ *Thatcher et al. v. Miller*, 11 Mass. Rep. 413. *Welles et al. v. Battelle et al.* 11 Mass. Rep. 477. *Commonwealth v. Parker et al.* 2 Pick. Rep. 550.

Under any other practice, numerous and important attachments must depend upon the life of almost every sheriff and deputy sheriff. And the failure might be considered a loss through his neglect, for which his estate would be responsible.¹

¹ Vide *Ingersoll v. Sawyer*, 2 Pick. Rep. 276.

CHAPTER XVII.

ENTRY OF ACTIONS.

1. *In the Court of Common Pleas.* The writ having been duly issued, served and returned, the action, if it be intended further to prosecute it, must be entered in the court, or before the justice, to whom the writ is returnable.¹

Formerly, by *Stat. 1782. ch. 11. s. 6.* no action could “be entered in any Court of Common Pleas, after the first day of the sitting thereof, except when the party was prevented from entering it, by inevitable misfortune or accident.” But by *Stat. 1820. ch. 79. s. 7.* it is provided, that the Court of Common Pleas, created by that act, “shall have power, from time to time, to make and establish all such rules for the entry of actions,” &c. “as may be thought proper, provided the same are not repugnant to the laws of the Commonwealth.” The statute last cited operates as a repeal of the preceding, and has placed the whole subject, at the disposal of the court, in the Court of Common Pleas, as in the Supreme Judicial Court.²

In the county of Suffolk. The Court of Common Pleas, in pursuance of its authority, has adopted for

¹ Note. In those actions, which, from having been settled, or for any cause, it is not intended to prosecute further, the writs, which have been returned to the clerk's office, are placed by him upon the file of “*non-entries*,” and nothing further is done with them by either party, unless subsequently taken therefrom, to be entered by leave of court.

² *Thompson et al. v. Hatch & Trs.* 3 Pick. Rep. 512.

the county of Suffolk, the rule for the entry of actions, made by the Boston Court of Common Pleas, and which is the following, namely:—

“A list of all actions intended for entry, shall be delivered to the clerk, on or before the evening of *Thursday* of the first week of each term, and shall be entered by him, and the new docket prepared for the examination of the gentlemen of the bar, and for entering of appearances, by nine o’clock in the forenoon of *Saturday* of the same week; and no list of entries shall be received by the clerk, after the evening aforesaid, nor any action be entered, excepting by order of court, after the time aforesaid:—and in all cases, in which actions shall be entered by order of court, after the time aforesaid, no attendance shall be taxed for the plaintiff, previously to the time of entering such action: and if the defendant shall be defaulted the first term, in any action so entered, no appearance having been entered for him, no attendance shall be allowed to the plaintiff.¹

The *mode* of entering actions in Suffolk, as well as the *time*, is fixed by the foregoing rule.

In counties other than Suffolk. No rule seems to have been established, for the entry of actions, in the other counties of the Commonwealth. The practice in them, however, is the same as was directed by *Stat. 1782. ch. 11.* and all actions must be entered on the first day of the term, with the exceptions named in that statute.

No action can be entered in the Court of Common Pleas, in any county other than Suffolk, unless the

¹ 35th Rule C. C. Pleas, and *third* rule referred to therein. Appendix B.

writ be returned and placed upon file in the clerk's office, except in extraordinary cases, in which the court may otherwise order.¹ Accordingly, in all those counties, the attorney, who is about entering an action, must see that the writ has been duly returned and filed, and if so, the entry will be made by the clerk, upon his mere request, and upon payment of the entry fee.²

2. *In actions before justices.* In justice actions, the writ must be entered on the day that it is made returnable. The entry is made by the justice, upon notice from the attorney, and upon receiving his fee.³

The same is true of actions returnable to a justices' court, as to the *time* of entering them. And the entry is made by the clerk of such court, in the same *manner* as in the Court of Common Pleas, in the counties other than Suffolk.

3. *In the Supreme Judicial Court.*—1. *At Nisi prius terms.* This court, in pursuance of the authority given to it by *Stat. 1782. ch. 9. s. 4.* to establish such rules and regulations, with respect to the “conduct of business,” as its discretion shall dictate, provided the same be not repugnant to the laws of the Commonwealth,—has adopted the following rule as to the entry of actions therein.

“No civil action shall be entered after the first day of the term, unless by consent of the adverse party, and by leave of the court, or unless the court shall allow the same, upon proof that the entry was

¹ 38th Rule C. C. Pleas. Appendix B.

² Note. The entry fee of writs in the Court of Common Pleas, will be stated in the Chapter on Costs.

³ Note. The entry fee of writs returnable before a justice of the peace, or a justices' court, will be stated as above.

prevented by inevitable accident, or other sufficient cause."¹

This rule applies to the entry, both of actions originally returnable to the Supreme Court, — which, from the very limited original jurisdiction of that court in civil actions at law,² are but few in number, — and also, of those, which are brought thither from inferior courts, in the modes which will be stated hereafter, which constitute the great proportion of entries therein.

No particular *mode* of entering actions, for either of the above cases, is directed by any rule of the Supreme Court. In practice, the attornies, at the time prescribed in the foregoing rule, deliver to the clerk a list of those actions, which they intend to enter, upon which, and on payment of the fees,³ the actions are duly entered. The *original* writs, however, in original actions, and *copies* of the papers, in those brought from other courts, — which copies the clerks of such courts furnish, — must be filed in the Supreme Court, before trial.

2. *At Law terms. — Time of entry.* All actions intended for argument, must be entered on a *law docket*, to be kept, for that purpose, by the clerk, — *continued actions*, before the opening of the court, on the first day of the term, — and *new entries*, at some time on the first day of the term. And no action shall be entered after those times, unless the entry

¹ Reg. Gen. S. J. C. 1. Appendix A. Note. As to the *time* and *mode* of entering appeals from the Municipal Court, vide Reg. Gen. S. J. C. 47. Appendix A.

² Vide ante page 14, 15, 16.

³ The entry fee of writs in the Supreme Judicial Court, will be stated in the Chapter on Costs.

were prevented by inevitable accident, or other sufficient reason.¹

Mode of entry. In every case intended for argument, copies of all the material papers must be delivered to each of the judges, — in *continued actions*, at or before the opening of the court, on the first day of the term, — and in *new entries*, at the time of the entry, as above stated; and no action can be entered by the clerk, on the law docket, until the papers are prepared and ready to be delivered, as aforesaid.² Accordingly, such copies must have been previously procured.³

Copies of papers. In order to provide such copies, which are thus essential to the entry of an action on the law docket, the party, who is to make the entry, must, previous to the law term, either file the papers, of which copies are required, with the clerk, in time for him to make the copies, — as it is his duty to do, when the papers are so filed,⁴ — or seasonably make them himself.⁵ Entire copies of all such material papers must be furnished for each judge, except, that when the question arises upon special pleadings, a special verdict, a writ of error, or certiorari, it will be sufficient to provide one complete copy for the chief justice, and abstracts, fully presenting the question raised, for the other judges: and that when the question arises upon the answers of a trustee, one copy of the answers shall be sufficient, unless additional copies shall be ordered by the court.

Such copies, whether made by the clerk or the

¹ Reg. Gen. S. J. C. 23. Appendix A.

² Reg. Gen. S. J. C. 24. Appendix A.

³ Ibid.

⁴ Reg. Gen. S. J. C. 27. Appendix A.

⁵ Reg. Gen. S. J. C. 28. Appendix A.

party, must be written “in a fair, legible hand, on one side only of each sheet, and with a convenient margin; and they shall be folded uniformly, like the other files of the clerk, with the names of the parties, and the number of the actions, indorsed thereon.”¹

The copies having thus been prepared, and seasonably filed, in readiness to be delivered to the judges, the action is entered by the clerk.

By whom the entry is made. In all cases of writs of error, or *certiorari*, issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, — the plaintiff or complainant must cause the action to be entered on the law docket, and furnish the papers, as above stated; and in all other cases, the same must be done, by the party who moves for a new trial, or who holds the affirmative upon the question to be argued: but this will not prevent the adverse party from making the entry, and furnishing the papers, if neglected by him, whose duty it is, as aforesaid.²

Order of actions on the law docket. All actions, in which the foregoing requisites have been complied with, are entered on the law docket, in the same order in which they stand on the general docket, and with their proper numbers prefixed to them, as they are numbered in the general docket; and if any be entered afterwards, by leave of court, they are put successively at the end of the law docket, and are not argued, until they come on in course, on that docket, though they have the same number, as upon the general docket.³

The rules of the Supreme Court, and Court of Com-

¹ Reg. Gen. S. J. C. 27, 28. Appendix A.

² Reg. Gen. S. J. C. 26. Appendix A.

³ Reg. Gen. S. J. C. 25. Appendix A.

mon Pleas, relative to the entry of actions, are binding in every respect, if they do not conflict with the provisions of the statutes.

No provision is made by law, for the case of an omission to enter an action, during the session. Although the party may have been prevented by inevitable accident, or even by fraud, from entering his action, yet if the term, to which his writ was returnable, have closed, there seems to be no remedy. The statutes for the entry of *appeals* in such cases, do not extend to this.

When an action is entered, the writ is placed on the files of the clerk; and it is thereby put into the custody of the law, so that neither party has any control over it.¹

It is the plaintiff, of course, who generally causes the writ to be entered. But when a suit has been commenced, and the writ served, if the plaintiff fail to enter his action, the defendant may appear, and by paying the clerk's fee of entry, cause the writ to be entered; and upon complaint made in writing to the court, shall recover his costs.²

¹ *Brigham v. Este*, 2 Pick. Rep. 420.

² Vide forms of such complaint in *Oliver's American Precedents*, 580.

CHAPTER XVIII.

APPEARANCE.

How made. The appearance of the plaintiff, is made by the entry of the action ; that of the defendant, by the entry of his name or that of his attorney, upon the clerk's docket, under that of the action, and this entry is usually made by the attorney himself.

When to be made. A rule of the *Supreme Judicial Court* requires that the name of the appellant or his attorney should be entered, at the time of the entry of the action, — and that of the appellee or his attorney, within two days after the entry of the action or appeal, for the want of which, a default will be ordered.¹

In the *Court of Common Pleas*, no particular time is fixed for the defendant's appearance. It must, however, be made before, or at the time of calling the docket, — which varies in different counties, — or he will be defaulted. But it is provided by statute,² that if the defendant, after having been defaulted, shall come in before the jury is dismissed, and shall pay to the opposite party his costs, or such part as the court shall order, the default shall be stricken off. This is usually done without objection, and costs are rarely, if ever, required to be paid.

If the defendant do not appear until the jury is dis-

¹ Reg. Gen. S. J. C. 7. Appendix A.

² Stat. 1784. ch. 28. s. 7.

missed, no express power is given to the Court of Common Pleas, to take off the default. Probably, if a good excuse should be offered for the delay, and the defendant should satisfy the court, that he had a meritorious defence, it would be done. Whether, if refused, the remedy of the defendant should be by exceptions, or by an application to the Supreme Court for a review, is doubtful.

CHAPTER XIX.

ROUTINE OF BUSINESS IN THE COURTS, &c.

SECT. I. IN COURT OF COMMON PLEAS.

The proceedings in a suit, which have thus far been considered, are those which take place, before the sitting of the court, to which the action is returnable.

For convenience of reference, a table of the terms of the courts, is added in the Appendix.¹

Calling the docket. A list of all writs entered, having been made by the clerk, in the docket of the court, in the order in which they are delivered to him for entry, by the attornies, — at an early day in each term, the docket is called by the judge, that is, all the cases are called over by him, in their order on the docket. The actions which have been continued from preceding terms, are always called in their order, on the first day of the term; and those which are newly entered, upon some subsequent day, during the term.²

At the calling of the dockets, the attornies on both sides of all the actions, should be present, to answer to the actions as they are called, in order that they may be disposed of.

¹ Appendix C.

² Note. There is no general rule, as to the time of calling the *new* docket, in the C. C. Pleas. In the county of *Suffolk*, it is always called on *Tuesday*, of the *second week*, in each term, in pursuance of the *fourth rule* referred to, in the 35th Rule C. C. Pleas. Appendix B: — and in the other counties, generally on the second or third day of the term.

As each action is called, it is, in some way, disposed of, either by *default*, where the defendant fails to appear,¹ or in such manner as the counsel signify to the court, as by *nonsuit*, — or by entering “*neither party*,” — or by *continuance*, either general or special, or on some condition, as that the defendant shall be defaulted at the next term, or that the judgment in the court below, shall be final, — or by continuance under the statute, because the defendant is out of the Commonwealth,² which fact should be suggested by the plaintiff’s attorney, — or, if there be no question of fact to be tried, by being marked “*law*,” or “*no jury*,” — or by *demurrer* to the Supreme Court, — or, being signified by the counsel, on either side, to be for trial, by being put on the *trial list*.

At the time an action is called as above, it is usual to make those motions, which are not required to be in writing, and which are granted of course, such as to *amend*, to *plead double*, calling for a *bill of particulars*, &c. The fact is minuted by the clerk, on the docket, and the right or claim is thereby secured.

It is not necessary, that these motions should be made at the calling of the docket, — a certain number of days, in each term, being allowed, within which they may be made, as will be specified under the several heads; but the practice stated, is usual.

Trial list. The actions both from the old and new docket, intended to be tried, having thus been designated, a separate list of them, called the *trial list*, is made out by the clerk, in the order in which the actions stand on the general dockets, the continued actions

¹ Stat. 1784. ch. 28. s. 7.

² Stat. 1797. ch. 50. s. 5.

taking precedence of the new entries. The juries having then been empannelled, as will be considered hereafter,¹ the court is ready to proceed to business; and the several cases contained in the trial list, after the pleadings have been filed, and the issues formed in them, as will be considered in the succeeding chapter, come on for trial, in their order on the list.

In our practice, therefore, if an action be put on the trial list, by either party, at the time the docket is called, no further notice is required to be given to the other, that a trial is intended to be had therein; and both parties will be holden to be ready for trial, when the case comes on in its order, unless good reason to the contrary be shewn. But if an action be put upon the trial list, at a subsequent day of the term, by either party, — as it may be, by leave of court, — special notice will be required to be given to the opposite party.

By a rule of the Court of Common Pleas,² however, in the following counties, namely: Berkshire, Franklin, Hampshire, Hampden, Worcester, Middlesex, Essex, Norfolk, Bristol, and Plymouth, — a party, to obtain a trial at the *first* term, besides complying with the foregoing condition, must give notice to the adverse party, *seven days* before the sitting of the court, that he shall expect a trial at such term.

Law sittings. The judges of the Court of Common Pleas, occasionally sit at chambers, either singly or together, for the purpose of hearing and determining cases on trustees' answers, motions for new trials,³

¹ Supra Chapter XXII.

² 33d Rule C. C. Pleas. Appendix B.

³ Stat. 1820. ch. 79. s. 7.

and such other questions of law, as fall within the exercise of their jurisdiction.

At these sittings, — of the time and place of which, the judges give notice, — all those cases, in which the entry of “*law*,” or “*no jury*,” was made, at the calling of the docket, or subsequently on the trial list, and those which have been put upon the “*nisi list*,” as it is called, during the term, as presenting questions on trustees’ answers, motions, or on any points of law, — of all which, a list is made by the clerk, at the end of the term, — are heard, determined and disposed of, by the judge or judges, who are present.

SECT. II. IN SUPREME JUDICIAL COURT.

1. *At nisi prius terms.* — *Calling the docket.* On the first day of each term, in every county, the list of *continued actions* is called over by the judge, — and the *new entries*, at such subsequent day, as he may appoint, giving due notice.¹

Trial list. At the calling of the dockets, the counsel on both sides, in every case, should be present; and such cases, as are signified by them, to be for trial, are put upon the *trial list*, which list is made up by the clerk, in the same manner, as in the Court of Common Pleas.²

¹ Vide “Rules of the Supreme Court for the county of Suffolk,” 1, 2. Appendix A.

² Note. In the county of *Suffolk*, if an action be not put on the trial list, at the calling of the docket, it cannot be afterwards, unless satisfactory reason be shewn. And all actions, which are not put upon the trial list, will be nonsuited or defaulted, on the motion of the counsel respectively, or dismissed from the court without costs to either party, on the day after the making out of the trial list as aforesaid, unless it ap-

Order of cases for trial. The pleadings having been filed, and the juries empannelled, the actions come on for trial, in their order on the trial list, — unless by consent of parties, and by leave of court, one action be substituted in the place of another, in which case, each will come on in the place of the other,¹ — or unless a continuance or postponement be granted, upon good cause shewn.

Motions for continuance or postponement. All motions for the continuance or postponement of civil actions, must be made on the first day of the term, or on the first day after the entry of the action, unless prevented by sufficient cause, or unless the ground of the motion, arise after that time, in which cases, the motion must be made, as soon afterwards as it can be, in the course of the court.²

The *manner* of making such motions, will be stated in the succeeding section.

2. *At law terms.* The actions which have been duly entered on the law docket, in the manner stated in the preceding chapter, come on for argument, in their order on that docket.³ There is no stated calling

pear by entry on the docket, that they are not in a state for trial. This applies both to continued actions, and new entries. Rules of the Supreme Court, for the county of Suffolk, 1, 2. Appendix A.

¹ Reg. Gen. S. J. C. 18. Appendix A.

² Reg. Gen. S. J. C. 19. Appendix A. Note. In the county of *Suffolk*, these motions for postponement must be made, immediately after the making out of the trial list, if the cause be then known to exist, otherwise, on the next day, after it is known. The motion must be sustained by affidavit, unless the ground of it appear upon the docket. All continued actions, which are postponed, are placed, in their order, at the end of the continued list, and stand for trial in that order, subject to be further postponed, if sufficient cause continue to exist. Rules of Supreme Court for the county of Suffolk, 3. Appendix A.

³ Reg. Gen. S. J. C. 29. Appendix A.

of this docket, as it is of itself a trial list, no actions being entered thereon, but those “intended for argument.”

If an action be called for argument, and neither party appear, it will be stricken from the docket. If one party only appear, he will be heard *ex parte*, or the court will render judgment, on nonsuit, or default, or such other judgment, as the case may require, except in cases of libels for divorce, and appeals from the Probate Court, where there may be an issue of fact.¹

SECT. III. MOTIONS, &c.

Time of making. In the *Supreme Judicial Court*, when the court is holden by a single judge, for jury trials, — in those counties, in which the court is usually in session, for more than two weeks, all *motions, reports of referees, petitions*, and other like applications, must be made and presented, on the first day of the term, or at the opening of the court, on the morning of each *Monday*, during the term :—and in those counties, in which the court is not usually in session, more than two weeks, all such motions and applications must be made, on the first day of the term, or at the opening of the court on the morning of each day. If, however, the ground of any such motion or application, first exist, or become known to the party, after these appointed times, it may be made, if the case require it, at any intermediate time.²

Notice to adverse party. If a motion be made at

¹ Ibid. For the order of proceedings, in cases of *written arguments*, vide Reg. Gen. S. J. C. 43. Appendix A.

² Reg. Gen. S. J. C. 21. Appendix A.

any of these specified times, notice to the adverse party, is not required, though, if it be not given, the court will allow him time to oppose the motion, if necessary. But if the motion be made, at any intermediate time, such notice must be given, before a hearing can be had.¹

The *Court of Common Pleas*, has prescribed no rule, as to the *time* of making motions, &c.

Mode of making. By a rule in both courts, no motion, grounded on facts, will be heard, unless the facts are verified by affidavit, or appear from the record, or from the papers on file in the case, or are agreed, and stated in writing signed by the parties, or their attornies; and the same rule will be applied, as to all facts relied on, in opposing any motion.²

The special affidavit, required on a motion for continuance, grounded on the want of material testimony, will be stated in the chapter on Continuance.³

All motions should be in writing, and after having been made to the court, should be filed with the clerk.

¹ Reg. Gen. S. J. C. 22. Appendix A.

² Reg. Gen. S. J. C. 16. Appendix A. 19th Rule C. C. Pleas. Appendix B.

³ Supra Book II.

CHAPTER XX.

PLEADINGS, &c.

The defendant, having, by the foregoing proceedings, been brought into court, and the *declaration* being contained in the writ, which having been duly entered by the plaintiff, is on file with the clerk, — the next step, in the order of proceedings, is taken by the defendant, who must, in some way, answer the plaintiff's action. This he may do in one of several ways, — by *motion to dismiss the action*, — by *plea in abatement*, — by *plea in bar*, — or by *demurrer*.

It would not be within the limits of this book, to treat of the subject of pleading generally, or to specify, in what cases, the different forms of pleading would be proper. The *mode* and *time* of using them, after they have been determined on, will be all that we are to consider.

SECT. I. MOTION TO DISMISS.

How made. If there be any defect in the plaintiff's writ, or in any of his proceedings, which constitutes a good ground for dismissing the action on motion, and the defendant intend so to avail himself of it, the motion must be made in writing, according to the general rule which has been stated.¹

The party making the motion, should then file it

¹ Vide ante Chap. XIX. Sect. III.

with the clerk, and give notice of it,¹ to the opposite party, unless both parties being present and ready, the court will hear it *instanter*: otherwise, it being filed, and notice given, the court will appoint a time for the hearing. Previous to the appointed time, the opposite party should file with the clerk, if necessary within the rule above cited, an affidavit of any facts, upon which he relies to resist the motion, and on the day fixed, the hearing will be had.

Time when to be made. No time seems to have been positively fixed, within which motions to dismiss an action must be made. It is presumed, however, that the court will not hear such a motion, after the first term, unless strong reasons be shewn; — nor will they at all, where the defect is cured by appearance, after the defendant has pleaded.

Judgment and costs. If the court sustain the motion, the action is, of course, dismissed, and the defendant, in all cases, except where the dismissal is for want of jurisdiction,² recovers costs. If the motion is overruled, the defendant must then answer further; —

¹ Note. On this subject of *notifying* the opposite party, it is to be regretted, that there are no positive rules in our practice, requiring either party, to give to the other, a certain number of days' notice, either by copy, as in the English practice, or in any other way, of his having filed his pleadings, or any papers in a case. It is true, that by a sort of common law, the court will not compel a party to answer the opposite pleadings, or to proceed in a case until a reasonable time, after he has seen those pleadings, or been apprized of any preceding step, taken by his adversary. But the course of practice, it is conceived, would be facilitated, if this matter were regulated by fixed rules. Accordingly, in consequence of this convenience, and because the court, in fact, requires that notice be had, — notifying the opposite party will, in all cases in this book, be stated as one of the requisites of properly filing pleadings, or taking steps in a case.

² *Williams v. Blunt*, 2 Mass. Rep. 207.

but the plaintiff recovers no costs, they abiding the event of the suit.

SECT. II. PLEAS IN ABATEMENT.

Time when pleaded. All pleas in abatement, in the Court of Common Pleas, including also pleas to the jurisdiction, must be filed within the first *four days* of the return term, and not afterwards.¹ The Supreme Judicial Court has made no rule upon the subject.²

How made and filed. The plea, being written, — and signed by the defendant's attorney, — except in those cases, where the rules of pleading require the signature of the party himself, or of some person in his behalf, other than an attorney, — should be filed with the clerk, within the limited time, and notice thereof be given to the opposite party. The clerk will then minute the time of filing it, either on the back of the plea, or on the docket, or on both, which minute is evidence of the fact.

These pleas are not, in our practice, required to be verified by affidavit, as in England.

Subsequent pleadings. If the plea in abatement, have been properly filed, the plaintiff must reply, or demur to it, for the court will not quash a plea in abatement, however bad, on motion.³

In the English practice, if the plea contain sufficient matter in abatement, and the plaintiff cannot deny it,

¹ 36th Rule of C. C. Pleas. Appendix B.

² In *Campbell v. Stiles*, 9 Mass. Rep. 217. the court say, that a plea in abatement may be filed in the *Supreme Court*, in an action originating there, at any time before an *imparlance*.

³ *The King v. Cooke*, 2 Barn. & Cress. 618.

he may enter a "*cassetur billa*," on the roll, as a matter of course, without payment of costs, and then deliver another declaration.¹ But with us, it is presumed, that in such a case, the plaintiff could only become nonsuit, and would be liable to all the consequences, as to costs, &c. of a nonsuit.

The pleadings, subsequent to a plea in abatement, are filed within the same time, and in the same manner, as those subsequent to a plea in bar, — the rules as to which, are stated in the next section.

If the plaintiff reply, and an issue of fact be joined, it is tried like any other issue of fact. If he demur, and the issue be one of law, it is tried like any other issue of law. Trials both of issues of fact and law, will be considered hereafter.

Judgment. 1. *For plaintiff.* If there be an *issue of fact*, on a plea in abatement, and a verdict for the plaintiff, the judgment is peremptory, that he recover;² and the jury should assess the debt or damage.³ But upon demurrer to the plea in abatement, or to a replication to such a plea, that is, if there be an *issue of law*, judgment, if for the plaintiff, is not final, but merely, that the defendant answer over.⁴ So on a replication by the plaintiff, of *nul tiel record*, the judgment, if for the plaintiff, is merely *respondeas ouster*.⁵

2. *For defendant.* Judgment for the defendant, on

¹ 2 Arch. Pract. 3, 236.

² Gilb. C. P. 53. 1 Ld. Ray. 594. 2 Ld. Ray. 1022. *Eichorn v. Le Maitre*, 2 Wils. Rep. 367. *Bowen v. Shapcott*, 1 East. Rep. 542. *Onslow v. Smith*, 2 Bos. & Pull. Rep. 388.

³ Ibid.

⁴ Ibid. 2 Saund. 210 g. note 3. Anonymous, 1 Wils. Rep. 302. *Barker v. Forrest*, 1 Strange, 532. Yelv. 112.

⁵ Ibid.

a plea in abatement, in all cases, whether upon an issue of fact or of law, is, that the writ be quashed;¹ — unless where the matter pleaded in abatement is some temporary disability, such as infancy, &c. in which case the judgment is, that the plaintiff remain without day, until, &c.²

If therefore, the judgment on a plea in abatement, be for the defendant, in any case, or for the plaintiff, on *verdict*, the action is thereby disposed of, subject however, to an appeal,³ or to a reservation of questions of law, which will be considered hereafter. But if the judgment be, that the defendant answer over, he must plead anew, and he cannot plead another plea in abatement, of the same degree as the one overruled.⁴ The case then proceeds, under the new pleading, in the manner stated in this section, — if the new plea, be in abatement, — and if in bar, in the manner pointed out in the next section — but in either case, without reference to the former pleadings, — until an issue of fact, or law arises, to be tried.

Costs. If judgment be for the *plaintiff*, on a *verdict* in his favor, upon an issue in fact, he is, of course, entitled to costs,⁵ for as we have seen, the judgment in such case is final. But if the issue be one of law, and found for him, as the judgment is only that the defendant answer over, there is no judgment for costs, but they abide the final result of the suit.⁶

Where the judgment, on a plea in abatement, is for the *defendant*, there is this distinction, in the English

¹ 1 Bac. Abr. Abatement, P. 29.

² 1 Chitty's Plead. 457.

³ Stat. 1784. ch. 28. s. 8.

⁴ For the *order* of pleas in abatement, see 2 Arch. Pract. 4. 2 Saund. 40, 41.

⁵ 1 Chitty Plead. 458.

⁶ Ibid. *Haines v. Corliss*, 4 Mass. Rep. 659.

practice, as to costs, that if it be on an issue in *fact*, the defendant is entitled to costs, but not on an issue in *law*.¹

With us, however, the defendant, in either case, would be considered the prevailing party, and as such, entitled to costs.²

SECT. III. PLEAS IN BAR.

How made and filed. Pleas in bar, are either the *general issue*, or *special pleas*.

When the general issue only is pleaded, the plea is simply written on the back of the writ, and signed by the defendant's counsel, — the *similiter* is written underneath, and signed by the plaintiff's counsel, — and the case then goes to trial.

If there be a special plea, or more than one, under leave to plead double, they should be reduced to writing, — signed by counsel, and filed with the clerk. The defendant should notify the plaintiff of his having filed the plea.

The same remark may be made of all the pleadings, subsequent to a plea in bar, — the replication, &c. They should all be reduced to writing, signed by the counsel of the respective parties, filed with the clerk, and notice thereof given to the adverse party. From them, when completed, there results, the issue of fact or of law, — and the case is then ready for trial.

Time of filing pleadings. There are no general rules in our practice, as to the time of filing pleadings.

¹ 1 Chitty's Plead. 458. *Garland v. Exton*, 1 Salk. 194. 1 Tidd. Pract. 566.

² *Haines v. Corliss*, 4 Mass. Rep. 659. *Thomas v. White*, 12 Mass. Rep. 367.

When the general issue only is pleaded, it need not be, and seldom is, filed, until just before the trial commences;—it is generally written on the writ, as above stated, while the clerk is calling the jury.

As to *special* pleas, it is a rule of the Supreme Judicial Court,¹ that in all actions brought there by appeal, the defendant, or tenant, if he intend to plead specially, shall file his plea, within *two days* after the action is entered, (the day of the entry to be reckoned as one,) unless for reasons stated in the rule, the court, on motion, assign a further time, and if the plea be not filed within the time prescribed in this rule, or that assigned by the court, the defendant loses his right to plead specially, and must plead the general issue, file a general demurrer, or be defaulted.

By the rules, both of the Supreme Judicial Court,² and Court of Common Pleas,³—when an action shall be continued, with leave to amend the declaration or pleadings, — or for the purpose of *making a special plea*, replication, &c. if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office, by the middle of the vacation after the term, when the order is made; and in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c. by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, his prior pleadings shall be stricken out, and judgment entered of nonsuit or default, as the case may require, unless the

¹ Reg. Gen. S. J. C. 5. Appendix A.

² Reg. Gen. S. J. C. 4. Appendix A.

³ 9th Rule C. C. Pleas. Appendix B.

court, for good cause shewn, shall allow further time for filing such amendment, or other pleadings.

With these two exceptions, special pleas and all subsequent pleadings may be filed at the convenience of the respective parties, with this restriction, both in the Supreme Judicial Court,¹ and the Court of Common Pleas,² that either party may obtain a rule on the other, to plead, reply, rejoin, &c. within a given time to be prescribed by the court:—and if the party so required, neglect to file his pleadings at the time, all his prior pleadings shall be stricken out, and judgment entered of nonsuit or default, as the case may require, unless the court, for good cause shewn, shall enlarge the rule.

From the pleadings thus made and filed, at their termination, arises the issue of fact or law. There is no other formal making of the issue, —as in the English practice,—the pleadings as filed, constituting the only record of the issue, for the purposes of the trial. The next step, therefore, after the pleadings are completed, in our practice, is, the trial, which, together with the subject of verdicts, judgments, and costs, will be considered under their respective heads.

SECT. IV. DEMURRER.

The fourth mode of answering the plaintiff's declaration, is by demurrer, — which is either *general* or *special*.

Time of filing. In the Court of Common Pleas,

¹ Reg. Gen. S. J. C. 3. Appendix A.

² 8th Rule C. C. Pleas. Appendix B.

all demurrers to *declarations* must be filed during the first *four days* of the return term, and cannot be afterwards.¹ In the Supreme Judicial Court, there is no rule upon the subject.

A demurrer to the declaration, is sometimes used by agreement of the parties, merely as a *form*, for the purpose of removing a case from the Court of Common pleas, to the Supreme Judicial Court. This will be considered, in treating of Appeals. It need only be remarked in this connexion, that when so used, it is not subject to the above limitation of time, but is filed at any time the parties may agree.

It will also be observed, that the foregoing rule of the Court of Common Pleas, is confined to demurrers to *declarations*. — Demurrers to subsequent pleadings, as to the *time* of filing them, fall within the rules of other pleadings generally, which have been stated under the preceding head of pleas in bar.

Mode of filing. A demurrer, like other pleadings, should be in writing, — signed, and filed with the clerk, and notice given.

At whatever stage of the pleadings, a demurrer is filed, the party, whose pleadings are demurred to, must join in the demurrer. An issue of law is then formed, which is to be tried by the court.

By a rule of the Court of Common Pleas, if in the same cause, there be an issue in fact and an issue in law, the issue in law shall be first argued and determined, unless the court, for good cause, otherwise direct.²

Judgment and costs. 1. *For plaintiff.* We have

¹ 36th Rule C. C. Pleas. Appendix B.

² 23d Rule C. C. Pleas. Appendix B.

already seen, that on demurrer to a plea in abatement, or to a replication to a plea in abatement, judgment for the plaintiff is not final, — but simply that the defendant answer over;¹ — and that the plaintiff does not recover costs.²

In other cases, judgment, if for the plaintiff, is final, where the amount claimed is a sum certain. But if the action be for damages, in assumpsit, &c. the judgment is interlocutory, — and the plaintiff must have his damages assessed by the clerk, — or move the court to have them assessed by a jury.

2. *For defendant.* Judgment on a demurrer, for the defendant, is always final,³ and he, of course, is entitled to costs.

Withdrawing demurrer. If the decision be against the party demurring, he will generally be allowed, upon payment of costs, to withdraw his demurrer and plead or reply; — but this is within the discretion of the court.⁴

SECT. V. TRUSTEES' ANSWERS.

Appearance of trustees. All the trustees summoned in any trustee process, must appear, before the court, and at the return day, named in the writ, or they may be defaulted. This appearance is effected

¹ Ante page 215.

² Ante page 216.

³ 1 Saund. 80. n. 1.

⁴ *Collins v. Collins*, 2 Burr. Rep. 820. *Howell et al. v. Mac Ivers et al.* 4 Term. Rep. 690. Note. For the rights of the parties, as to *amending*, after demurrer filed or decided, — vide Chapter on Amendment. *Supra* Book II.

by the entry of the name of the trustees, or of their attorney or attornies, under the name of the action upon the docket.¹

Time of making answers. There is no precise time fixed, within which trustees must make and file, either their original answers, or their answers to the interrogatories, subsequently filed by the plaintiff. That it be done within a reasonable time, is all that is required.

If, however, one summoned as trustee, intend to discharge himself, and to recover costs,² he must come in at the *first term*, and declare, “that he had not, in his hands or possession, at the time the writ was served on him, any goods, effects, or credits, of the principal,” and thereupon submit himself to examination. And, in practice, trustees usually file a general answer at the first term, — either the one above stated, — or declaring, “that they had not any goods, &c. unless the court shall otherwise adjudge, upon the examination, to which they submit themselves,” — or stating the situation of their transactions with the principal, and praying the court to determine, whether or not, they are chargeable as trustees, — or admitting,

¹ Note. In the county of *Suffolk*, by a rule which applies only to that county, every trustee, who lives within the county, when he enters his appearance, must give notice thereof, to the counsel of the plaintiff, either personally, or by leaving a notification at his office, if he keep one within the county, advising him, that he has appeared in the action, and will be ready to answer such interrogatories, as may be proposed to him, on some certain day, not exceeding *three days*, from the time of such appearance. And the declaration of the trustee, inserted in his answer, and sworn to, will be sufficient to prove such notice. And until such appearance and notice, the trustee cannot have fees for attendance. 35th Rule C. C. Pleas, and *fifteenth* and *sixteenth* rules, referred to therein. Appendix B.

² Stat. 1794. ch. 65. s. 3, 4.

that they did have property in their hands, belonging to the principal, at the time of the service of the writ.

If the plaintiff be not satisfied with the general answer of the trustee, he must file his interrogatories with the clerk, and give notice thereof, to the trustee, who must make and file his answers thereto, and give notice thereof, to the plaintiff. The plaintiff may then, in like manner, file further interrogatories, which the trustee must, in like manner, answer, and so on alternately, until the examination is completed. These interrogatories and answers must be respectively filed within reasonable times; and if a trustee unreasonably neglect to answer interrogatories, the court, on motion of the plaintiff, will assign a day, by which his answers shall be filed, or the trustee defaulted.¹

By whom answers must be made. If the trustee live in the county, where the writ is returnable, he must answer in person, that is, his own name must be signed to his answers. But if he reside in any other county, he may appear and answer, by attorney. And in the latter case, if the plaintiff do not see fit, further to examine the trustee, his answers, so made by attorney, shall be deemed and taken to be true.²

Mode of answering. The answers of the trustee, should be in writing, and signed, either by himself, or his attorney, according to the rule just stated. Upon the back of the written answer, should be minuted the names of the counsel for the plaintiff, and trustee.³ And if either party wish to be heard, before the decis-

¹ 35th Rule C. C. Pleas, and *seventeenth* rule referred to therein. Appendix B.

² Stat. 1817. ch. 148. s. 2.

³ 29th Rule C. C. Pleas. Appendix B.

ion of the court, there must, also, be minuted, the words, "*for argument.*"¹

The answers, thus prepared, are filed with the clerk, who minutes upon them and upon the docket, the time of receiving them.

Making oath to answers. It is, in no case, necessary, that the general answer, first made by the trustee, should be sworn to, if an examination upon interrogatories be intended.² Nor is it necessary, — though it is sometimes practised, — that the trustee should make oath to each set of answers, when he files them. He may wait until the examination is concluded, and then, at once, make oath to all his answers.

If the trustee live in any other county, than that, in which the writ is returnable, and the plaintiff see fit to examine him upon oath, after he has made his general answer, the answers of the trustees may be sworn to, before any judge of the Court of Common Pleas, for the county, in which he dwells, or before any justice of the peace; and such answers, being duly filed in the court, in which the writ is pending, shall have the same effect, as if they had been sworn to, in that court.³

If the trustee live in the same county, in which the suit is brought, he generally makes oath to his answer in court, before the clerk. But this is not necessary; for if he have appeared in court, and submitted himself to an examination on oath, his answers may be sworn to, in the same manner, as if he resided out of the county.⁴

¹ 29th Rule C. C. Pleas. Appendix B.

² *Chapman v. Phillips*, 8 Pick. Rep. 25. Stat. 1817. ch. 148. s. 2.

³ Stat. 1817. ch. 148. s. 2.

⁴ *Ibid.*

The answers of the trustees having been duly filed and sworn to, and the examination completed, the case, on the motion of either party, in term time, is put on the "*nisi list*," and is heard, if necessary, and determined, by the judge, at the law sittings at chambers, usually in vacation, without the intervention of a jury. At the succeeding term, the judgment, if made up, is declared by the judge, by which the trustee is either discharged, and if so, with full, or partial costs, or without costs, according to the rules hereafter to be stated,¹ — or he is charged to a certain amount.² The case is thus disposed of, so far as the trustee is concerned, unless it be carried to the Supreme Court.³

When and how, an assignee may become a party to a trustee process. If a person summoned as trustee, shall, in his answers, disclose an assignment to another, of the goods, &c. of the principal, in his hands, — and the plaintiff shall object, that the assignment ought not to defeat his attachment, the assignee so named, may, if the court think it just or convenient, become a party to the suit, for the purpose of trying the validity and effect of the assignment.⁴

Such assignee may so become a party, either by appearing voluntarily, and claiming to be so admitted, —

¹ Vide Chapter on Costs.

² Note. By *Stat.* 1829. *ch.* 128. *s.* 2. a person, who is summoned and charged as trustee, may retain for counsel fees; the amount so to be retained, and the necessity of employing counsel, to be determined by the court.

³ Note. The practice stated in this section, is that of the *Court of Common Pleas* only, — that court being the only one, to which trustee writs could be made returnable, until by the recent *Stat.* 1833. *ch.* 171. they were allowed, in certain cases, to be brought to the Supreme Judicial Court.

⁴ *Stat.* 1817. *ch.* 148. *s.* 1.

or by coming into court, upon being notified for that purpose, by a summons, which the court, upon the motion of either party, is authorized to issue, to be served and returned, in such time and manner, as the court may think the circumstances of the case require. If the supposed assignee do not appear, in pursuance of such summons, his non-appearance will be entered on the record, or the case may be continued to the next term, for further notice to the assignee, at the discretion of the court. If such assignee do not eventually appear, either in person, or by attorney, then the assignment shall have no effect, to defeat the plaintiff's attachment. But if he do become a party, then the validity of the assignment, or its effect upon the case, shall be tried by the court, or by a jury, as the case may require : and on the trial, the original defendant may be admitted as a witness, upon the application of either party.¹

The trial, if by the court, is like a common hearing upon trustees' answers, — and if by a jury, is the same as an ordinary jury trial. Upon its determination, the court may award legal costs, for and against any of the parties, at its discretion ; — and either party may appeal from the judgment.²

¹ Stat. 1817. ch. 148. s. 1.

² Ibid.

CHAPTER XXI.

EVIDENCE.

The *mode* of procuring the different sorts of evidence, that may be used in the trial of a cause, is all that, under this head, comes within the limits of the subject of practice.

And in reference to this point, the kinds of evidence so used, may be reduced to these three, namely, *documents, public or private,—oral testimony or witnesses,—and depositions.*

SECT. I. DOCUMENTS.

If documents, such as statutes, public or private,—records of any courts, judgments foreign or domestic, verdicts, &c. be required in the course of a trial, the party needing them, will procure the *originals*, if necessary, at their place of deposit,—or *copies*, where they are admissible, authenticated according to the laws of evidence, in the various cases.¹

If deeds, or wills, or writings not under seal, or books of accounts, or private papers of any sort, be required, the party, if they be not controlled by his adversary, will obtain and produce the originals, or copies, where allowable, duly authenticated:—and in cases where the execution of such papers must be proved, will provide himself with the legal evidence of

¹ Vide 1 Stark. Ev. 150. for the legal evidence of all such documents.

the subscribing witnesses, or otherwise, to that point, by oral testimony, or by depositions.¹

Notice to produce papers, &c. If any written instrument, which would be evidence for one party, if produced, be in the possession or control of the other, the former should serve the latter, or his attorney or agent, with a notice to produce it at the trial. There is no particular form of this notice, — but a copy of it should be kept, attested to be a true one, by the person who delivers the original. If the party who has the instrument, do not produce it, the other, upon proving the service of the notice, will be permitted to prove the contents of the instrument by a copy or other secondary evidence, in the same manner as if it had been destroyed or lost.

SECT. II. WITNESSES.

Subpœna. The attendance of witnesses, at a trial, is compelled by a *subpœna*, which is a judicial writ, directed to the witnesses, commanding them to appear before the court, and at the time therein specified, to give their evidence in the case named in the writ.

The *form* of subpœna, which is used, in all common cases, in our practice, is prescribed by statute.² It is not required to be under seal,³ and it may be signed, in all cases, by the clerk of each town respectively, or by any of the clerks of the several courts,⁴ or by any justice of the peace.⁵ It is most generally signed by

¹ Vide 1 Stark. Ev. 330. for the legal evidence of all such documents.

² Stat. 1784. ch. 28. s. 5.

³ Ibid.

⁴ Ibid.

⁵ Stat. 1783. ch. 42. s. 5.

one of the counsel in the case, who is a justice of the peace.

No particular *mode of serving* a subpoena, is directed by the statute, nor need the service be made by any particular person. If the writ be served by an officer, — as in practice, it generally is, — his simple return upon the back thereof, is evidence of the service. But if served by any indifferent person, his affidavit is necessary, to shew that it has been done.

In the English practice, the names of but four witnesses can be included in a single writ of subpoena; but with us, there is no limit as to the number.

There is no limited *time* before the trial, within which, a subpoena must be served. It must, of course, be done, so as to give the witnesses summoned, a reasonable time, to come to the place specified, if they reside at a distance: but where they are at hand, the subpoena is generally served, at most but the day before the trial, and often, after the trial has commenced.

The fees of the witnesses, for travel and attendance, should be paid or tendered to them, at the time of the service of the subpoena, or they cannot be proceeded against for not appearing.¹

If a witness who has been regularly summoned, and to whom his fees for travel and attendance have been paid or tendered, neglect to appear, “having no reasonable let or impediment to the contrary,” the court, on motion, will issue a *capias*, to bring him before them to testify, and may fine him at discretion, not exceeding the sum of six pounds, and order him to

¹ Vide Stat. 1784. ch. 28. s. 6. Witnesses' fees for *travel* and *attendance*, will be stated in the Chapter on Costs.

pay the costs of such attachment : and such witness is further liable to the action of the aggrieved party, for all damages by him sustained by the default.¹

Subpœna duces tecum. If a person, who is not a party to the cause, have in his possession any written instrument, &c. which could be evidence for either party at the trial, instead of the common subpœna, a *subpœna duces tecum*, should be served upon him, commanding him to bring with him, and produce at the trial, the instrument named.

This writ may be made from the common one, by adding the command, to bring the specified instrument, and is signed, served, and returned in like manner with the former.

The witness, upon being duly summoned, and having his fees tendered or paid to him, must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful or reasonable excuse for withholding it, of the validity of which excuse, the court, and not the witness, is to judge.² And if he fail to obey the commands of the subpœna, he will undoubtedly be liable, as in the case of the common writ.

Habeas corpus ad testificandum. If the witness be in custody, at the time of the trial, the only way of bringing him into court, to give evidence, is by a writ of *habeas corpus ad testificandum*. This writ can be obtained only upon motion to the court, and, in the English practice, the application must be accompanied by an affidavit, stating that the witness is a material one ; — but this affidavit is not always required in prac-

¹ Stat. 1784. ch. 28. s. 6. Swift's Evidence, 105.

² *Amey v. Long*, 9 East. Rep. 473.

tice here. If the motion is allowed, the writ is made out, signed by the judge allowing it, and directed to, and left with the officer, in whose custody the witness is, who will bring him up, on being paid his reasonable charges.¹

In case of the absence of a witness. The affidavit which it is necessary to make, in order to obtain a continuance, on account of the absence of a material witness, will be stated in the chapter on Continuance.²

SECT. III. DEPOSITIONS.

Cases in which they may be taken. If any person, whose testimony is required in any civil action, which shall be pending in any court, or before any justice of the peace in this Commonwealth, and wherein the writ, original summons, or complaint, shall have been served on the defendant,³ or be pending before referees or arbitrators,—live more than *thirty miles* from the place of trial,—or shall be bound on a voyage to sea before, or be about to go out of the Commonwealth, and not to return in time for the trial,—or shall be so sick, infirm or aged, as not to be able to travel and attend the trial,—his *deposition* may be taken; *provided*, the party desiring such deposition, comply with the requisitions of the statute.⁴

Time when they may be taken. Either party may procure depositions to be taken, at any time after the writ has been served upon the defendant, and before

¹ 2 Tidd's Pract. 724.

² Supra Book II.

³ *Amory v. Fellowes*, 5 Mass. Rep. 219.

⁴ Stat. 1797. ch. 35. s. 1.

the trial or hearing; and that, too, in term time, as well as in vacation. But if taken in term time, it must be done in the town where the court is holden, and at an hour when the court is not actually in session, unless, upon good cause shewn, the court shall specially order the deposition to be taken.¹

Mode of procuring depositions to be taken. The party intending to procure a deposition, must apply to some justice of the peace, who is not of counsel, or attorney to either party, or interested in the event of the cause. The justice so applied to, need not be the one, before whom the deposition is to be taken, but may be the same, or any other, at the election of the party making the application.²

Notice to the opposite party. Unless notice be waived by the opposite party, or his attorney, as may be done,³ the justice so applied to, must, in all cases,⁴ issue a notice to the opposite party, — the form of which notice, is prescribed by statute,⁵ — informing him of the name of the person, whose deposition is to be taken,⁶ at whose request, and in what suit it is to be used, and notifying him of the time and place, at which it is to be taken.

Verbal notice, however, from the justice who is to take the deposition, will supersede the necessity of such formal notice.⁷

¹ Reg. Gen. S. J. C. 12. Appendix A. 14th Rule C. C. Pleas. Appendix B. Vide *Jones et al. v. Spring et al.* 7 Mass. Rep. 251.

² Stat. 1817. ch. 181. s. 1.

³ Ibid.

⁴ Ibid.

⁵ Stat. 1797. ch. 35. s. 2.

⁶ *Minot v. Bridgewater*, 15 Mass. Rep. 492.

⁷ Stat. 1817. ch. 181. s. 1.

Service of notice. But if such formal notice be resorted to, as it generally is, to prevent any question, it must be served on the adverse party, or his attorney, by leaving an attested copy thereof, at his last and usual place of abode, allowing time for his attendance after being notified, not less than at the rate of *one day*, Lord's days exclusive, for every *twenty miles'* travel.¹

Where there are several plaintiffs or defendants, in any action, notice to one of them, in whichever of the two ways given, is sufficient.²

By whom served. The notice may be so served either by a disinterested person, — or by the sheriff or his deputy of the county, or the constable of the town, where such adverse party, or his attorney lives. If by the former, his affidavit is necessary to prove the notice : — but if by either of the officers named, his return on the notification, will be sufficient proof.³

Notice to attorney. If the adverse party in any case, live more than *twenty miles* from the place of taking any deposition, and his attorney shall live within that distance, the notice, as above, shall be served upon the attorney, instead of upon the party himself. But no person for this purpose, shall be considered such attorney, until he shall have indorsed the writ, or indorsed his name on the summons left with the defendant, — or have appeared for his principal in the cause, — or have given written notice to the opposite party, or his attorney, that he is such attorney.⁴

Notice so given to an attorney, who appears of

¹ Stat. 1797. ch. 35. s. 2.

² Ibid.

³ Ibid.

⁴ Ibid.

record, will always be sufficient; for his right to appear, in such case, cannot be questioned by the party whom he represents.¹

Summons to deponent. If the party, applying to have the deposition taken, desire it, the justice applied to, will also issue his summons to the deponent, in the form prescribed by statute,² requiring him to appear at the time and place specified, to testify in the case named.

Service of summons. This summons must be served in the same manner, as the notice to the adverse party. And if the deponent, after having been duly summoned, and having had his fees,³ tendered to him, neglect to appear, he shall be subject to like actions, forfeitures, and attachment as are provided by law, where witnesses are summoned to court, and do not appear.⁴

Mode of taking depositions. At the time and place appointed, the party, who requested the deposition to be taken, and the opposite party, if he see fit, or their attornies, together with the deponent, assemble before the justice, who is to take the deposition. The party, who caused the deponent to be summoned, first examines him, and the opposite party, if present, cross-examines him. The questions of each party, in their order, together with the deponent's answers to them, and the objections which either party may make to any questions put by the other, are written down, at the time the questions are put, objections made or an-

¹ *Smith v. Bowditch*, 7 Pick. Rep. 137.

² Stat. 1797. ch. 35. s. 4.

³ *Ibid.* The amount of deponents' fees will be stated in the Chapter on Costs.

⁴ Stat. 1797. ch. 35. s. 4.

swers given, either by the justice, or by the deponent himself, or some disinterested person, in the presence of the justice; but never by a party to the case.¹ When the examination on both sides is concluded, and the result reduced to writing, the deposition must be signed and sworn to by the deponent. The justice, having then affixed to it the certificate prescribed by statute,² must either deliver the deposition with his own hand, to the court, or justice, &c. for which it is taken, — or seal it up and direct it to such court, justice, &c. and in the latter case, the deposition must remain under his seal, until opened in court, or by such justice, &c.³

Opening depositions. The depositions having been so returned to court, by the justice, must be opened and filed with the clerk, at the term for which it is taken, and will then be used, if the trial of the case, in which it is taken, come on at that term. But if the action be continued, the deposition must remain on the files, and will be open, when offered on trial, to the same objections, as at the term when it was opened. If not so left on the files, it cannot be used by the party who originally produced it;⁴ but such party may, if he see fit, withdraw it during the same term; in which case, it shall not be used by either party.⁵

After the depositions are taken, and returned to the court, by the justice, by whom they were taken, the

¹ *Amory v. Fellowes*, 5 Mass. Rep. 219.

² Stat. 1797. ch. 35. s. 3.

³ *Ibid.*

⁴ *Vide Goff v. Goff*, 1 Pick. Rep. 475. *Potter v. Leeds et al.* 1 Pick. Rep. 309.

⁵ Reg. Gen. S. J. C. 10. Appendix A. 12th Rule C. C. Pleas. Appendix B.

party, at whose instance they were taken, may cause the same to be opened, at any time, by the clerk of the court, who will minute the fact upon the deposition.

2. *Taking depositions by commission.* By the *seventh* section of *Stat. 1797. ch. 35.* the justices of the Supreme Judicial Court, or of the Court of Common Pleas, may grant a *dedimus potestatem*, to have depositions taken either within or without the Commonwealth, in any action pending in such courts respectively, on such terms and conditions, as they from time to time, shall prescribe.

This mode of taking depositions by a commission from the court, is resorted to, where the depositions are to be taken in other states, or in foreign countries. It may be used, however, when the deponent is in the Commonwealth; but it seldom is, the former method in such case, being more convenient.

Application for commission. Either party may apply for a commission, at any time after the writ has been served upon the defendant, and before the trial; the application, however, should, in all cases, be made within a reasonable time, after the necessity for it is known to exist, for the court will not continue an action, to await the return of a commission, when there has been any omission or neglect, in taking it out.¹

The application may be made either in term time, or in vacation. If made in *term time*, it must be to the court, who will appoint the commissioners; but if *in vacation*, it may be made to the clerk, in which case, the commission will be directed to any justice of

¹ Vide Rules of Supreme Court, for the county of Suffolk, 4. Appendix A.

the peace, notary public, or other officer legally empowered to take depositions or affidavits, in the state or country, where the deposition is to be taken, unless the parties agree on commissioners. The application need not be in writing, in either case, — but being verbally made, is minuted by the clerk on the docket, and the privilege is thereby secured.¹

Filing interrogatories, &c. The party applying for the commission must, in each case, file his interrogatories in the clerk's office, and give notice thereof to the adverse party, or to his attorney, *seven days*, at least, before taking out the commission, and one day more, for every ten miles such party or his attorney may live from the clerk's office. The adverse party, within such seven or other number of days, according to the distance of his residence from the clerk's office, must file therein, his cross-interrogatories, if he intend to file any; and if either party object to any of the interrogatories or cross-interrogatories of the other, he should minute his objection under the same, before the commission issues, although the court will not hear the objection until the return of the commission.²

Issuing and return of commission. The interrogatories and cross-interrogatories having been duly filed, they must be annexed to the commission, which the clerk will then issue. The commission is under the seal, and tested by the Chief Justice of the court from which it issues, — directed to the commissioners, generally, by name, and requesting them to take the answers to the interrogatories, &c. annexed, and to

¹ Reg. Gen. S. J. C. 11. Appendix A. 13th Rule C. C. Pleas. Appendix B.

² Anon. 2 Pick. Rep. 165.

return the whole. The commission, when duly prepared, is delivered by the clerk, to the party who applied for it, by whom it is forwarded to the commissioners. When executed, it is returned by them under seal, to the clerk's office, and when there, it is opened, filed, and must be kept in the same manner as depositions taken in the other mode.

The commission generally specifies the names of the commissioners, and also the names of the witnesses, whose depositions are to be taken, and it should always specify the latter, when they are known.¹

A commission, however, may be issued, directed to *any* magistrate, to take the deposition of *any* witness that may be produced; but where either party applies for such a general commission, the opposite party, on application to a judge of the court, at his chambers, may procure an order to the clerk, to insert a direction, that he, or his agent at the place where the deposition is taken, shall have notice of the time and place of the taking thereof. And if such direction be not inserted in the commission, and such notice be not given, the deposition will be rejected.²

¹ *Bryant et al. v. Commonwealth Insurance Company*, Suffolk, Nov. 1830.

² *Ibid.*

CHAPTER XXII.

JURY.

How selected. Soon after the settlement of this country, the practice was adopted, of *electing* the jurors for every court, from among the people; and this was continued for many years. But now, jurors are *drawn*, — the mode of doing which, as also the qualifications of jurors, is regulated by statute.

The selectmen of each town or district, must provide, and cause to be kept, in their respective towns, a jury box ; and must, once in three years, at least, prepare a list of such persons, as are legally qualified to serve as jurors, and having written their names upon tickets, cause them to be placed in the jury box.¹

And there must be provided and constantly kept in the box, to be drawn when required, a number of jurors equal at least, to one for every sixty persons which the town shall contain, computing by the last census.²

Qualifications of jurors. The list which the selectmen are directed to prepare, must contain the names of “such persons, under the age of *seventy years*, as they shall judge well qualified to serve as jurors, being persons of good moral character, and qualified, as the constitution directs, to vote in the choice of representatives.³

¹ Stat. 1812. ch. 141. s. 2.

² Ibid. s. 3.

³ Ibid. s. 2. Note. By the constitution, as it stood when the statute last cited, was passed, and before the amendments made in 1820, the

Term of service of jurors. No person is liable to be drawn, or to serve, on any jury, at any court, oftener than one term in *three years*.¹

Persons exempted from serving as jurors. The persons exempted from serving upon juries are, — the Governor, Lieutenant Governor, counsellors, judges, clerks of the common law courts, secretary and treasurer of the Commonwealth, loan and revenue officers, judges and registers of probate, registers of deeds, settled ministers of the gospel, officers of any college, preceptors of incorporated academies, physicians and surgeons regularly authorized, cashiers of incorporated banks, sheriffs and their deputies, marshals and their deputies, counsellors and attornies at law, justices of the court of sessions, criers of the judicial courts, constables and constant ferrymen.²

All *engine men* are excused from being chosen or drawn, to serve as jurors in any court, in all cases, where the town, to which they belong, shall, at a legal meeting of its inhabitants, by vote, declare the expediency of excusing such persons, from serving as jurors.³

If any person, whose name shall be in the jury box, shall be convicted of any scandalous crime, or guilty of any gross immorality, his name shall be withdrawn from the jury box, by the selectmen.⁴

persons, qualified to vote in the choice of representatives, were, "every male person being twenty one years of age, and resident in any particular town in this Commonwealth, for the space of one year next preceding, having a freehold estate, within the same town, of the annual income of three pounds, or any estate, of the value of sixty pounds."

¹ Stat. 1812. ch. 141. s. 2.

² Ibid.

³ Stat. 1808. ch. 25.

⁴ Stat. 1807. ch. 140. s. 2.

How summoned. The several counties, excepting Suffolk, Dukes, and Nantucket, are divided into *jury districts*, — the number of which cannot be less than four, nor more than twelve, in each county, — from which the jurors are drawn, so as to make the burden fall on the several towns, as nearly as may be, equally and in rotation.¹

Jurors are summoned by the writ of *venire facias*, which, at common law, is directed to the sheriff, commanding him to *cause to come*, the required number of good and true men, and leaving the selection to him.

In this state, the writs of *venire facias* are directed to the constables of the various towns, by the clerks of the several courts,² who then deliver them to the sheriffs of the counties, to be by them, forwarded to the respective constables.³ The constables are then required to notify, in usual form, the selectmen, town-clerk, and freeholders of their towns, to meet, at least *six days*, and not more than *twenty days*, before the sitting of the court, to which the *venire* is returnable, and, at such meeting, to draw from the jury box, the required number of jurors.⁴ The jurors having been drawn, at such meeting, in the manner prescribed by statute,⁵ the constable must summon them, at least, *four days*, before the sitting of the court, and make seasonable return, of his *venire*, with his doings thereon, to the court, whence it issued.⁶

¹ Stat. 1807. ch. 140. s. 3.

² Ibid.

³ Ibid. s. 4.

⁴ Ibid.

⁵ Ibid. s. 5.

⁶ Ibid. s. 6.

If necessary, at any court, the *venire* may direct the drawing of *two sets* of jurors, the latter to be called *provisional* jurors. The proceedings, however, are precisely the same.¹

Return of the venire facias. By a rule of the Supreme Judicial Court,² every *venire facias*, must be made returnable into the clerk's office, by ten of the clock in the forenoon, of the first day of the term, and the jurors shall be required to attend at that time; excepting only, when in case of a deficiency of jurors, the court shall order an additional *venire facias* in term time, in which case, the same shall be made returnable forthwith, or at such time, as the court shall order.³

The constables, therefore, must make return of their writs of *venire*, at the time and place specified therein. And their returns, as in all other cases, should state their doings, so that it may appear, whether or not, they have complied with the statute; though in some cases, the court have allowed deficiencies in this respect, to be supplied. Thus where a constable had omitted to insert the name of a juror, in his return of the *venire*, the juror was, nevertheless, put upon the panel, on his making oath, that he had been summoned.⁴

So, where it did not appear by the constable's return on the *venire*, at what time, he summoned the jurors, they were put upon the panel, on his making oath, that he had duly summoned them.⁵

¹ Stat. 1807. ch. 140. s. 12.

² Reg. Gen. S. J. C. 38. Appendix A.

³ Ibid. Stat. 1807. ch. 140. s. 7.

⁴ *Patterson's Case* 6 Mass. Rep. 486.

⁵ Anonymous, 1 Pick. Rep. 196.

Penalties. Penalties are imposed by the statute,¹ upon the selectmen, constables, town-clerks, clerks of courts, and sheriff, for any unjustifiable neglect of duty, in the summoning or drawing of jurors, or in returning the *venire* ; — and also upon any juror, who shall unnecessarily neglect to appear at court, after having been duly drawn, and notified to attend.²

How empannelled. The writs of *venire facias* having been returned into court, the clerk makes out a list of the traverse and petit jurors returned, arranging them alphabetically.³ This being done, they are sworn as jurymen, for the trial of all civil actions, that may come before them. The first twelve on the list, compose the *first*, and the next twelve the *second* jury ; and the remainder, if any, are severally sworn, and remain in attendance, during the term, as *supernumeraries*, to supply any vacancies that may occur.⁴

The juries, being thus empannelled, will each elect a foreman, who will act as such, in the trial of all civil actions, during the term.⁵

Talesmen. If, from any cause, there should be a deficiency of jurors, in any case which is called on trial, the court may direct the sheriff or his deputy, or in case of his being interested, a coroner, or any disinterested person, to return one or more jurors, but never exceeding *five* in any particular case, *de talibus circumstantibus*.⁶ Such jurors ought regularly, to be returned for each case, in which they serve ; yet

¹ Stat. 1807. ch. 140. s. 17.

² Ibid.

³ Stat. 1807. ch. 140. s. 10, 11.

⁴ Ibid. s. 11.

⁵ Ibid.

⁶ Ibid. s. 7.

where one was empannelled a second time, without being specially returned for the case, this was holden to be no objection to the verdict.¹

Challenges. Challenges, at common law, are of two kinds, namely, *challenges to the array*, — and *challenges to the polls*.

Challenges to the array. A challenge to the array, — being an exception to the whole panel, not for any defect in the jurors, but on account of some partiality or default, in the sheriff or other officer, who arrayed the panel,² — cannot be made, in our practice, as the manner of drawing and empannelling juries with us, is entirely different from that at common law, and as we have seen, altogether independent of any influence from the sheriff.

Challenges to the polls. Challenges to the polls, are exceptions to one or more of the jurors, individually, and are divided into two kinds, namely, *principal challenges*, and *challenges to the favor*.

1. *Principal challenges to the polls.* The causes of principal challenges to the polls, are such matters, as carry with them, *prima facie*, evident marks of suspicion, either of malice or favor. And, in our practice, these causes may be classed under *two* heads.³

¹ *Amherst v. Hadley*, 1 Pick. Rep. 38. *Howland v. Gifford*, 1 Pick. Rep. 43. note.

² Co. Litt 156 a. 3 Black. Comm. 359.

³ Note. At common law, (Co. Litt. 156 a.) the causes of principal challenge to the polls, are classed under *four* heads, viz. 1. *Propter honoris respectum*. 2. *Propter defectum*. 3. *Propter affectum*. 4. *Propter delictum*.

The first of these classes, is inapplicable in this country, as depending on a title of nobility. The first head in the text, embraces the *second* and *fourth*, — and the second head in the text, the *third* of these classes.

First. Objections to the qualifications and capacity of the juror, — as that he is an alien, — or an infant, — or a person *non compos*, — or that he has not the requisite understanding, character, or property; — or that he has not been properly drawn, or summoned.

Secondly. Objections on account of some bias, actual or presumed, — as that the juror is of kin to either party, within the ninth degree,¹ — or that there is an affinity, or relationship by marriage, between the juror and one of the parties, if it be a subsisting affinity at the time of the challenge, or there be issue of the marriage alive, otherwise, it is only a challenge to the favor,² — or that the juror has been chosen by one of the parties, as an arbitrator in the same cause, and acted as such,³ — or that he has formerly served as a juror, in the same cause, — or that he has declared his opinion, on the question in controversy,⁴ provided such opinion were not merely hypothetical,⁵ — or that there is an action implying malice, depending between the juror and either party, — or that the juror is interested in the cause, or that he is the master, servant, tenant, or attorney of either party, or is a member of the same society or corporation, — or that he has, by money, entertainment, or in any way, been bribed by either party.⁶

By *Stat.* 1807. *ch.* 75. *s.* 5. no person shall be allowed to sit upon a jury, for the trial of any action,

¹ Finch. L. 401.

² Co. Litt. 157 b. 3 Black. Comm. 363. *Cain v. Ingham*, 7 Cowen. Rep. 479.

³ Ibid.

⁴ *Pringle v. Huse*, 1 Cowen. Rep. 432. and note 1.

⁵ *Durell v. Mosher*, 8 Johns. Rep. 347.

⁶ Co. Litt. 157. Gilb. C. P. 95. 3 Black. Comm. 363. *Boote's Suit at Law*, 158. Vide 3 Salk. 81.

where the value of buildings and improvements are to be ascertained, or the value of the premises to be estimated, by the verdict, where such person shall be interested in a similar question, either as proprietor or occupant, but the same shall be good cause of challenge.

Challenges to the polls, when and how made. It is a general rule, that all challenges to the polls, should be made before or at the trial, and that, if then omitted, the objections will be considered as waived.¹ But if the cause of challenge were not then known, or if the party, after making the requisite examination, had failed to discover the objection, — or if it appear, that fraud has been practised, or injustice done, the court, upon application after verdict, would grant a new trial.²

Though a challenge, or exception to a juror, if not taken at the time of empannelling, cannot be made afterwards, — yet if the judge improperly overrule a challenge, the party challenging is not concluded, by proceeding in the trial, from availing himself of the objection, to set aside the verdict.³

2. *Challenges to the polls for favor.* Challenges to the favor, are where the party has no principal challenge, but objects only some *probable* circumstances of suspicion, as intimacy, acquaintance, and the like.⁴

They are of the same nature, with principal challenges, for bias, interest, &c. but of an inferior de-

¹ *Rollins v. Ames*, 2 New Hamp. Rep. 349. *Jeffries et al. v. Randall*, 14 Mass. Rep. 205. *Amherst v. Hadley*, 1 Pick. Rep. 38. and note 1.

² *Ibid.*

³ *Blake v. Millspaugh*, 1 Johns. Rep. 316.

⁴ 3 Black. Comm. 363. *Steinbach v. Columbian Ins. Co.* 2 Caines' Rep. 129.

gree. The general rule of law being, "that the juror must stand indifferent, as he stands unsworn,"¹ any objection, which, though probable, is not sufficiently *prima facie*, to amount to matter for a principal challenge, may be the ground of a challenge to the favor. The causes, therefore, of challenges to the favor, are infinite.

Challenges to the polls, how tried. 1. *All principal challenges to the polls* are tried by the court, without the intervention of triors.

2. *All challenges to the polls for favor*, are tried by *triors*, under oath. These triors, if the first juror called be challenged, are two indifferent persons, appointed by the court. If they find, that the person challenged stands indifferent, he and the two triors try the next; and when another is found indifferent, and sworn, the triors are superseded, and the two first, sworn on the jury, try the rest.²

A juror may, himself, be examined on his *voire dire*, as to such grounds of challenge only, as are not to his discredit or dishonor. And by statute,³ in this state, the court, on motion of either party in a suit, shall put any juror upon his oath, whether he is in any way, related to either party, — or has formed or given any opinion, — or is sensible of any particular interest or prejudice in the cause: and if not indifferent, another juror shall be called.

So, where a person, not summoned, was sworn, and sat upon the jury, in the name of a person, who was summoned, and the irregularity was noticed before

¹ Co. Litt. 157 b.

² Co. Litt. 158. 3 Black. Comm. 363.

³ Stat. 1807. ch. 140. s. 9.

verdict, a new trial was granted.¹ But it is not imperative on the party, in such cases, to proceed in the trial; and if a proper challenge be overruled, he will not be nonsuited, for refusing to proceed.²

If a juror be objected to, at the time of the trial, and the fact objected to be inquired into, by examining the juror upon oath, according to the statute, and he be adjudged to stand indifferent, — the same objection cannot be made a ground for granting a new trial, though evidence to support it, be afterwards discovered.³

All challenges to the polls are made *ore tenus*.

¹ *Dovey v. Hobson*, 6 Taunt. Rep. 460.

² *Gardner v. Turner*, 9 Johns. Rep. 260. *Pringle v. Huse*, 1 Cowen Rep. 432.

³ *Borden v. Borden*, 5 Mass. Rep. 67, 80. Vide *Jeffries et al. v. Randall*, 14 Mass. Rep. 205.

CHAPTER XXIII.

TRIAL AND VERDICT.

SECT. I. TRIAL.

In what cases a trial is had by jury. By the Constitution of the United States,¹ in suits at common law, where the value in controversy shall exceed *twenty dollars*, the right of trial by jury shall be preserved: and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of common law.

By the Constitution of Massachusetts,² it is provided, that “in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury: and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and in such as relate to mariners’ wages, the legislature shall hereafter find it necessary, to alter it.

In *Shirley v. Lunenburg*,³ it was holden, that questions relative to the settlement and removal of paupers, might be tried without a jury. Such questions, the court say, come within the exception in the constitution, of cases, “in which it has heretofore been otherwise used and practised;” and from the settlement of

¹ Art. VII. of the Amendments.

² Part I. Art. 15.

³ 11 Mass. Rep. 379.

the country, they have been uniformly heard and determined, by the court of General Sessions of the Peace, without the intervention of a jury.

The civil actions, of which justices of the peace have jurisdiction,¹ come within the same exception.

In *Mountfort v. Hall*,² it is intimated, that prosecutions for the breach of the militia laws, likewise fall within the same exception.

In *Charles River Bridge Corporation v. Warren Bridge Corporation*,³ the question was discussed, how far this constitutional provision embraced proceedings in equity. The court waived any decision of the point, but intimated that they should always *grant* a trial by jury, when claimed, unless the claim appeared to be vexatious, or for delay; and such has been the practice.

SECT. II. COURSE OF THE TRIAL.

The pleadings having been filed, and the jury empaneled, the cases, upon the *trial list*, come on in their order, for trial, subject to the rules, which have already been stated.⁴

Jury fees. Before a cause is opened to the jury, the jury fees must be paid, by the plaintiff or appellant:—if unpaid, the attorney of the plaintiff or appellant, will be responsible for them, unless the

¹ Stat. 1807. ch. 123. s. 1.

² 1 Mass. Rep. 443.

³ 7 Pick. Rep. 344, 368.

⁴ Ante Chap. XIX. page 206, 208.

court, upon a subsequent nonsuit, or default, see fit to remit them.¹

Opening the case. 1. *By which party.* The general rule is, that the party having the affirmative of the issue, and consequently the burden of proof, shall open and close the case to the jury.

Where there is a plea of the general issue, and a special plea, and the general issue is not waived, the *plaintiff* shall open and close. But if the *defendant*, at the opening of the trial, waive the general issue, he may, in the *Court of Common Pleas*, open and close.² This latter rule, however, is not applied in the *Supreme Court*.³

But in both courts, where the *defendant* pleads only a special plea in avoidance or justification, and issue is taken upon it, he shall open and close, — as in an action of trespass *quare clausum fregit*, where the defendant pleads soil and freehold, without the general issue.⁴ If, however, the replication to such special plea, confess and avoid it, as in case of the plea of infancy, where a new promise is replied, it seems that the *plaintiff* again acquires the right of opening and closing.⁵

Where there are several issues, the *plaintiff* opens and closes, if he have affirmed upon any.

In an action of *replevin*, if the defendant plead property in himself, or in a stranger, the *plaintiff* shall

¹ Reg. Gen. S. J. C. 36. Appendix A. 26th Rule C. C. Pleas. Appendix B.

² 28th Rule C. C. Pleas. Appendix B.

³ *Ayer v. Austin*, 6 Pick. Rep. 225.

⁴ Vide *Davis v. Mason*, 4 Pick. Rep. 156. *Ayer v. Austin*, 6 Pick. Rep. 225. *Brooks et al. Exors. v. Barrett et al.* 7 Pick. Rep. 94. 28th Rule C. C. Pleas. Appendix B.

⁵ *Ibid.*

open and close.¹ And in the argument of all questions, arising upon the answers of trustees, the *plaintiff* shall open and close.²

2. *Manner of opening.* The counsel for the party, who has the right of opening, — or the junior counsel, where there are two, — commences by reading to the jury, the declaration in the writ, together with the subsequent pleadings. He then shortly states to them the substance of these pleadings, and the points, upon which issue has been joined, and which they are to determine. He then states the facts and circumstances of the case, the substance of the evidence which he intends to adduce, and its application to the points of the case; and he also remarks upon, and cites his authorities for, any principles of law, on which, together with the matters of fact, the jury will have to found their verdict. He may also state the matter of defence, if it appear from the record, or from a notice of set-off, or the like, and also the evidence, by which he can disprove it.

Calling and swearing witnesses. The opening counsel then calls his witnesses, who are sworn by the clerk, or presiding judge.

In the administration of oaths, in this Commonwealth,³ the ceremony of lifting up the hand, must be practised, with such exceptions, as to Mahometans, and other persons, who believe that an oath is not binding, unless taken in their accustomed manner, as

¹ 28th Rule C. C. Pleas. Appendix B.

² Ibid.

³ Stat. 1797. ch. 35. s. 10. *Catholics* are permitted to make oath, upon the Holy Evangelists, holding the book in their hands and kissing it.

the several courts shall find necessary for the execution of the laws.

Quakers are in all cases, allowed to *affirm*.¹

Examination of witnesses. The witnesses called, are then severally examined, — the junior counsel generally conducting the examination, though the senior counsel may put any questions, that he pleases. When the examination in chief of each witness is concluded, the opposite counsel may cross-examine him.

It is impossible to furnish any specific directions, as to the *mode* of examining witnesses, for this depends upon the peculiar circumstances of each case, — the character of the witnesses, — and, in no small degree, upon the talent and experience of counsel. There are a few general rules upon this subject, as also upon the mode of *cross-examining* witnesses; but they belong more properly to the subject of evidence, — in the treatises upon which, they are stated at length.²

The opening counsel, also produces, and reads to the jury, any documents upon which he relies, and any depositions, that may have been taken in the case.

When a witness is supposed to be incompetent. The circumstances, which wholly disqualify a person as a witness, are, *First*. The want of religious belief, such as renders the party incapable of the obligation of an oath. — *Secondly*. The infamy of his character. — *Thirdly*. A legal interest in the result of the cause.³

If the witness offered be supposed to be incompe-

¹ Ibid. s. 9. Stat. 1810. ch. 127. s. 1.

² Vide 1 Stark. Ev. 119—150.

³ 2 Stark. Ev. 393.

tent from want of *religious belief*, he may be asked before he is sworn, whether he “believes in the existence of a God.” This seems now to be the only question, that goes to the *competency*, for it has been holden, in this state,¹ that a question as to the belief of the witness, “in a future state of rewards and punishments,” — which was formerly coupled with the other, as a test of competency, — goes only to the *credibility* of a witness.

If a *child* be offered as a witness, the court will first examine him, as to his sense of the obligation of an oath, before permitting him to be sworn.

If the incompetency arise from the *infamy* of the witness, this objection ought also to be taken, before he is sworn. If he have been convicted of a crime, a record of the conviction should be produced;² for a witness is not bound to answer a question, upon the subject of any offence imputed to him, which would subject him to punishment. Whether he is bound to answer a question, to his own *disgrace* merely, is not settled, — but it seems, that such a question may be asked.³

Where the incompetency arises from *interest*, it was formerly necessary, to make the objection, before the witness was sworn in chief, and to swear and examine him as to his interest, on the *voire dire*, and it was holden, that the objection could not be taken, after an examination in chief. But by the present practice, the objection may be taken, after the witness has been ex-

¹ *Hunscom v. Hunscom*, 15 Mass. Rep. 184.

² 2 Stark. Ev. 716.

³ 1 Stark. Ev. 137--144.

amined in chief; and if his interest appear at any stage of the trial, his testimony may be set aside.¹

The defence and evidence. When the party who opened the case, has thus examined his witnesses, and gone through his evidence, — the junior counsel of the opposite party states to the jury, the matter of his client's defence, — the evidence which he shall adduce in support of it, — and remarks upon the case and evidence of the other party, so far, as to make his own case intelligible. He then calls his witnesses, who are sworn, examined, and cross-examined, in the manner, already referred to, — and also produces any written evidence that he intends to introduce. When the evidence is all in, the senior counsel in the defence, argues the case fully to the jury, and thus closes it on his part.

The reply. After the senior counsel for the defence, has thus closed the case, on his part, — the senior counsel of the opening party does the same, on his side, by a full argument to the jury, and the case is then closed on both sides.

Judge's charge. When the case is closed on both sides, the judge sums it up, that is, he states to the jury, the matters really in dispute between the parties; recapitulating, from his notes, the evidence given on both sides, and making his remarks upon it, when necessary. If there be any questions of law involved in the case, he states to them the principles, upon which the case must be decided, and the manner in which they must be applied, and their bearing upon the case. He also states to them, if necessary, the form, in

¹ 1 Stark. Ev. 122.

which their verdict must be given. The case is then committed to the jury.¹

Deliberation of the jury. After the cause has thus been committed to the jury, unless they agree upon their verdict, without quitting the jury box, they retire to a room provided for the purpose, to deliberate upon their verdict, — a sworn officer accompanying and taking charge of them.

After they have retired, they are not allowed to speak with any person, except the officer who keeps them, and not with him, until they have *agreed* upon their verdict. Neither, after having so retired, can they receive any new evidence. Even the judge, who presided at the trial, is not permitted to give any instructions or directions to the jury, respecting the cause, unless in open court, and where practicable, in the presence of both parties. Any such communication, will be a good ground for a new trial.²

It is the practice here, to suffer the jury, to take with them, all the written evidence, which has been used in the case, though, at common law, the practice is different. In the English courts, they are allowed to take, only letters patent, deeds under seal, and exemplifications of depositions in chancery: but they may take other books and papers not under seal, by consent of parties.³

The jury should remain together, until they are discharged by a verdict, or by order of court. By the

¹ The subjects of "*pleas puis darrein continuance*," — "*bills of exceptions*," and "*demurrers to evidence*," — which are incident to that of the trial of causes, will be considered, under their respective heads, in Book II.

² *Sargent v. Roberts et al.* 1 Pick. Rep. 337.

³ 1 Arch. Pract. 197, 198.

established practice of the courts, however, juries are frequently permitted, when they are out during a long adjournment of the court, or for the night, to seal up their verdict, when they have agreed, and then to separate.¹

By *Stat.* 1807. *ch.* 140. *s.* 15. it is provided, that if a jury, after due and thorough deliberation on any civil cause, with which they may be charged, shall return into court, without having been able to agree on a verdict, it shall be in the discretion of the court, explaining to them its understanding of questions of law, if any should be proposed, and re-stating what the testimony of any witness was, should that be requested by the jury, to send them out again for further deliberation: and if the jury should return a second time, without being able to agree on a verdict, they shall not be liable to be sent out a third time, unless they shall state some legal difficulties for explanation, which have not been previously attended to by the court.

Return of the jury, and delivery of the verdict. When the jury have agreed upon their verdict, they return into court, and bring with them their verdict, in all civil cases, in writing, and also under seal, if, by permission of the court, they have separated, after having agreed. The verdict is then read aloud by the clerk, who asks the jury, if they affirm the same;—for a verdict is not valid and final, until pronounced and recorded in open court, and before it is thus affirmed, the jury may vary the verdict, as first returned by them.² And after the verdict is received, the

¹ Vide *Winslow v. Draper*, 8 Pick Rep. 170.

² *Root v. Sherwood*, 6 Johns. Rep. 68. *Blackley v. Sheldon*, 7 Johns. Rep. 32.

jury may be *polled*, at the request of the party against whom it is, that is, the jury may be asked *individually*, whether they agree to the verdict, as it is read, and then either juror may disagree thereto.¹ The court, however, are not bound to poll the jury.² But when they have given their verdict, and have affirmed it, it is beyond recall, and the jury are discharged of the case. No juror can then be allowed to say, that he will not agree to it,³ — or that he agreed to it, upon mistaken principles;⁴ — nor can the affidavit of the jurors be read, to impeach their verdict.⁵

When the verdict has been thus returned, and affirmed, it is marked on the docket by the clerk, and is considered as then *recorded*, although the record of the case is not, in fact, made up, until afterwards.

SECT. III. VERDICTS.

Verdicts are of two kinds, *general* and *special*. The former, are where the jury find, that the defendant was "*guilty*," or "*not guilty*;" — "*did promise*," or "*did not promise*," &c. The latter, are where they find a special statement of facts, and refer the question of law upon the facts, to the court.

1. *Special verdicts*. The right of the jury to return special verdicts, was introduced by *Stat. West. 2*.

¹ Ibid. *The People v. Denton*, 2 Johns. Cas. 276. Vide *Parrott et al. v. Thacher et al.* 9 Pick. Rep. 426.

² *Ropps v. Barker et al.* 4 Pick. Rep. 239.

³ 1 Keh. 416.

⁴ *Bridge v. Eggleston*, 14 Mass. Rep. 245.

⁵ *Dana v. Tucker*, 4 Johns. Rep. 487. But vide *Smith v. Cheetham*, 3 Caines' Rep. 57.

Much formality is required in framing them;¹ but in our practice, they are seldom resorted to, as the same object is more easily obtained, by the jury finding a verdict, subject to the opinion of the court, upon the report of the evidence, by the judge who presides at the trial.

2. *General verdicts. How framed.* General verdicts ought to be framed, in the words of the issue tendered;² but if they are not, the court will put them in form, according to the justice of the case, before they are affirmed, if the point in issue can be collected from the finding.³

And the verdict should find the whole issue tried,⁴ and nothing more. If a jury should find facts not submitted to them, besides finding the issue, such improper finding will be rejected as surplusage,⁵ — as if they should undertake to find *costs* for either party, with which subject, they have nothing to do.⁶

It is the duty of the party, in whose favor the verdict is rendered, to see that it is put in regular form; and this is usually done at the bar, before the verdict is affirmed.

Return of the verdict, &c. The manner of returning, affirming, and recording the verdict, has been stated in the preceding section.

Where there are several counts in the declaration. If there be a general verdict, on a declaration containing several counts, the plaintiff may, at any time dur-

¹ 2 Tidd's Pract. 798. Vide *Walker v. Dewing et al.* 8 Pick. Rep. 520.

² *Gerrish v. Train*, 3 Pick. Rep. 124. *Harding v. Brooks*, 5 Pick. Rep. 244.

³ *Porter v. Rummary*, 10 Mass. Rep. 64.

⁴ 3 Salk. 372, 374. *Clark v. Lamb*, 6 Pick. Rep. 512.

⁵ *Bacon v. Callender*, 6 Mass. Rep. 303.

⁶ *Lincoln v. Hapgood et al.* 11 Mass. Rep. 358.

ing the term, on motion, have leave to amend the verdict, and enter it on any count, on which the evidence by law, would, at the trial, have entitled him to recover, and may have leave to strike out of his declaration, any defective counts.¹

The privilege secured to the plaintiff, by this rule, is an important one; for if any of his counts are defective, and he take a general verdict upon them all, it may be set aside.²

¹ 32d Rule C. C. Pleas. Appendix B.

² Vide *Hancock et al. v. Haywood*, 3 Term. Rep. 433. *Barnes et ux. v. Hurd*, 11 Mass. Rep. 59.

CHAPTER XXIV.

DAMAGES.

Damages are a pecuniary compensation, given for an injury;¹ and in most cases, in which they are recoverable at all, they are the sole object of the action.

In what actions recoverable. In *real actions*, no damages are recoverable, — the verdict of the jury simply determining, in some form or other, to which of the contending parties, the title to the demanded premises belongs.

But in all *personal and mixed actions*, damages may be recovered, with the exception of actions upon statutes for penalties. If, however, the plaintiff shew that he has sustained an injury in point of law only, but no actual damage, the jury may find a *nominal* sum merely.

Manner of assessing damages. At common law, upon a *default*, or upon a judgment on *demurrer*, the court may assess the damages, without the intervention of a jury, where there is any rule by which they may be ascertained. But where they are uncertain, a writ of inquiry is generally awarded.

In this Commonwealth,² upon *default* made by the defendant, the court shall give such damages, as they shall find, upon inquiry, that the plaintiff has sustained, unless the plaintiff shall move to have a jury to inquire into the damages, in which case, the court shall

¹ Co. Litt. 257.

² Stat. 1784. ch. 28. s. 7.

enter up judgment for such damages, as the jury shall assess.

And the same course, it is presumed, would be pursued, in case of a judgment upon *demurrer*. But notwithstanding this power, “the court generally refuses to assess the damages, in actions where the law has prescribed no rule by which they may be measured, but leaves them to the feelings of a jury.”¹

Upon the trial of an *issue of fact*, it is, in all cases, the province of the *jury*, to assess the damages, — and the assessment of them is part of their verdict.

Amount of damages. The amount of damages, in all personal actions, is solely within the discretion of the jury, except in those cases, where either by the agreement of the parties, or by the provisions of statute, the measure of damages is fixed.

Where there are several counts in the declaration. On a declaration containing several counts, the jury may assess, either entire damages upon the whole or a part of the declaration, or several damages on the different counts.² It is safer, however, to have the damages *severally* assessed; because if a verdict be entered generally on all the counts, and entire damages given, if one or more of the counts be bad or inconsistent, the judgment may be arrested *in toto*,³ — while if the damages are severally assessed, judgment, if arrested at all, can be arrested only for so much as is defectively alleged, or upon which no action will lie,

¹ *Perry v. Goodwin*, 6 Mass. Rep. 498. Vide further as to the assessment of damages, upon *default*, supra Chapter XXV. Sect. 1.

² 1 Rol. Abr. pl. 1.

³ *Grant v. Astle*, 2 Dougl. Rep. 722, 730. *Cook v. Cox*, 3 Maule and S. Rep. 110. *Hopkins v. Beedle*, 1 Caines' Rep. 347. *Livingston v. Rogers*, 1 Caines' Rep. 584.

without affecting those causes of action which are sufficiently set forth, or upon which an action may be maintained.¹

But even though entire damages be given upon a general verdict, — yet if it appear from the judge's notes, that evidence was given on the good counts only, or that the jury calculated the damages on evidence applicable to the good counts only, the court will amend the verdict, by entering it on those counts.²

The rule of the *Court of Common Pleas*, allowing the plaintiff, in all cases of a *general verdict*, to amend, by entering it on one count, was stated in the preceding section;³ and that rule would necessarily apply, where *entire damages* were given by the jury.

Where there are several defendants. In actions *ex contractu*, where there are several defendants, the damages must, of course, be entire, for if the plaintiff do not prove all the defendants *jointly* liable, he fails in his action altogether.

In actions *ex delictu*, where the defendants join in pleading, the jury, if they find them jointly guilty, cannot sever the damages;⁴ so though the defendants sever in pleading, or one suffer judgment by default, yet if there be but one trespass, and both or all are found guilty of the whole trespass, joint damages must be assessed against all.⁵

¹ *Hancock et al. v. Haywood*, 3 Term. Rep. 433.

² *Eddowes et al. v. Hopkins et al.* 1 Dougl. Rep. 376. *Williams v. Bredon*, 1 Bos. & Pull. 329. *Spicer v. Teasdale*, 2 Bos. & Pull. 49. 2 Saund. 171 a. *Baker v. Sanderson*, 3 Pick. Rep. 348. *Cornwall v. Gould*, 4 Pick. Rep. 444.

³ Ante page 259.

⁴ *Hill et al. v. Goodchild*, 5 Burr. Rep. 2790. *Mitchell v. Milbank et al.* 6 Term. Rep. 199.

⁵ *Ibid.* 1 Saund. 207 a. note 2.

But the jury may find one of them guilty of the trespass, at one time, and the other at another;¹ or one of them guilty of part of the trespass or trover, and the other of another;² or some guilty of the whole trespass, and the other guilty of part only;³ in all which cases, they may assess several damages.⁴

If the jury should sever the damages by mistake, the plaintiff may cure the defect, by taking judgment *de melioribus damnis*, against one, and entering a *nolle prosequi* as to the other:—or by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages, against both.⁵ And if the defendants should sever in pleading, the jury who try the first issue, must assess damages against all; there will then be a *cesset executio*, until the other issues are tried, when the other defendants, if found guilty, shall be contributory to those damages.⁶

When the plaintiff has thus obtained judgment against several defendants, he may levy the whole upon any one of them: and such defendant, if the action were *ex contractu*, may, after paying these damages, maintain an action against the other defendants, and oblige them to contribute their respective shares; but if the action were *ex delicto*, he cannot compel the others to contribute, and is entirely without remedy.⁷

¹ Cro. Car. 54.

² *Heydon's Case*, 11 Co. 5.

³ Cro. Eliz. 860.

⁴ *Proprietors of Kennebeck Purchase v. Boulton et als.* 4 Mass. Rep. 419.

⁵ *Sabin v. Long*, 1 Wils. Rep. 30. Cro. Car. 192.

⁶ *Heydon's Case*, 11 Co. 5.

⁷ *Merryweather v. Nixan*, 8 Term. Rep. 186.

CHAPTER XXV.

JUDGMENTS.

Judgments are divided into *interlocutory* and *final*.

1. *Interlocutory judgments.* Interlocutory judgments are such as are given, during the progress of a cause, upon some plea, proceeding, &c. which is only intermediate, and does not finally determine or complete the suit; as in the action of *account*, that the defendant account; or upon demurrer to a plea in abatement, that the defendant answer further.

2. *Final judgments.* Final judgments are such as, at once, put an end to the action. They are the award of the court, that the plaintiff recover his damages and costs;—or, if for the defendant, that the plaintiff take nothing by his writ, and that the defendant recover his costs, and sometimes also, his debt or damage, as where he has pleaded a set off.

Final judgments are of four kinds.

First. Where the facts, and the law arising upon the action, are admitted by the defendant, as charged by the plaintiff, as in cases of judgments by *confession* or *default*.

Second. Where the plaintiff is convinced, that the facts, or the law, or both, are insufficient to support his action, and he therefore abandons his suit, as in cases of *nonsuit* or *retraxit*.

Third. Where the facts are confessed by the parties, and the law determined by the court, as in cases of judgment upon *demurrer*, or on an *agreed statement of facts*.

Fourth. Where the law is admitted by the parties, and the facts disputed, as in case of judgment upon a *verdict*.¹

SECT. I. JUDGMENT UPON DEFAULT.

When the defendant fails to appear, or having appeared, neglects to take the requisite steps, on his part, in the proceedings of a case, the only mode, in our practice, of procuring a judgment against him, is by causing him to be defaulted. If he do not appear, he is defaulted of course, at the calling of the docket; but if, after having appeared, he do not regularly proceed in the cause, he may be defaulted, on motion of the plaintiff.²

The *mode* of defaulting is simply by causing the crier of the court, to call upon the defendant, in open court, to come in and answer to the plaintiff. If he do not appear or answer, the clerk minutes the default on the docket.

When a defendant, upon whom a writ has been regularly served, is defaulted, judgment will be entered for the plaintiff of course.³ And this judgment, in our practice, is final, and not interlocutory in its nature, as in England. It is so considered there, be-

¹ 3 Black. Comm. 396.

² Note. The various modes of confessing judgment, in use in the English practice, as by *cognovit*, — *warrant of attorney*, — *non sum informatus*, and *nil dicit*, are not known with us. They are all merged in the simple *mode of defaulting*, stated above.

Recognizance. It should be observed, however, that there is a mode of confessing a debt, by *recognizance before a justice of the peace*, prescribed by Stat. 1782. ch. 21. the proceedings in which are regulated, at length, in that statute. But this form of proceeding is but little used.

³ *Coolidge et al. v. Carey*, 14 Mass. Rep. 115.

cause a final judgment is not rendered, until the damages have been assessed. But with us, upon default, judgment is rendered generally for the plaintiff, either on some day in the term, upon motion, or of course, on the last day, and the subsequent assessment of the damages, — which, we have seen,¹ may be made, either by the court, or on motion of the plaintiff, by a jury, — relates back to, and forms a part of, the original judgment.

Assessment of damages. As to the assessment of damages upon default, it is not necessary, that it should appear of record, by whom it was made; but unless the contrary appear, it will be presumed to have been made by the court.² And in practice here, in most cases, the plaintiff himself assesses the damages. If his writ specify his claim, as by describing a promissory note, or by containing an account annexed, or otherwise, he takes his judgment and execution, as a matter of course, for the amount specified, upon filing with the clerk, the note, account, or document declared on. If his declaration be general, he files a specification of his claim, with the clerk, who will issue execution, as on a judgment for that amount. These proceedings are matters of course; for though a defendant after being defaulted, may be heard as to the assessment of damages, *before* judgment is entered, yet it would seem, that *after* judgment, he can only resort to his writ of review, in case there be fraud or error in the assessment of the damages.³

¹ Ante page 261. Stat. 1784. ch. 28. s. 7.

² *Jarvis v. Blanchard*, 6 Mass. Rep. 4.

³ Note. In case the court should direct the damages, after a default, to be assessed by a jury, — as they may do, — we have no practice like the English, as to summoning a special jury, by the sheriff, &c. With

SECT. II. JUDGMENT UPON NONSUIT.

The only mode in our practice, in which judgment can be obtained against a plaintiff, for costs, in case he fails to prosecute his action, is by causing him to be *nonsuited*.¹ If he do not appear, that is, if he do not enter his action, the defendant, on complaint to the court, may enter it, and have the plaintiff nonsuited;² but if having entered, he fail, in any way, to prosecute it, the defendant may procure a nonsuit on motion.

And the plaintiff may voluntarily become nonsuit, at any time before the jury deliver their verdict,³ unless by so doing, injustice be done to the defendant.⁴

The *mode* of nonsuiting, is by the crier, in open court, calling upon the plaintiff, to come in and prosecute his suit against the defendant. If he do not, he is marked on the docket by the clerk, as nonsuited.

It should be observed, however, that a nonsuit

us, the court would commit the matter, to one of the regular juries, in attendance upon the court, by whom it would be tried, in the same manner as common cases, with the exception, that the trial and verdict would be confined merely to *the amount of damages*.

¹ The various modes, by which a plaintiff may abandon his action, in the English practice, as by *discontinuance*, — *nolle prosequi*, — *stet processus*, — *retraxit*, — and *cassetur billa vel breve*, are not known here. They are merged in the *nonsuit*, stated above.

It should be remarked, that although in our practice, *discontinuance*, and *nolle prosequi*, are thus merged in *nonsuit*, when they go to the *whole* of the plaintiff's action, yet that a plaintiff may *discontinue* as to a *part* of his cause of action, and enter a *nolle prosequi*, as to *some* of the defendants, without being nonsuited.

² Vide ante page 202.

³ 3 Black. Comm. 376.

⁴ *Haskell v. Whitney*, 12 Mass. Rep. 47.

is not regarded as a confession by the plaintiff, that he has no cause of action; for the judgment for the defendant is no bar to a second action for the same cause.

When the plaintiff has thus been nonsuited, the defendant may take judgment against him for costs, on any day of the term, upon motion,—or he will have judgment therefor, on the last day of the term, as a matter of course. Nothing then remains but to tax his costs, which will be considered hereafter.¹

SECT. III. JUDGMENT UPON DEMURRER.

1. *For plaintiff.* Judgment for the *plaintiff*, on *demurrer* to a plea in abatement, or to a replication to a plea in abatement, is merely *respondeas ouster*. In this case, there are no damages to be assessed, or costs taxed, but the defendant must plead anew; and the case is then tried upon such new pleadings.

In all other cases of demurrer, though the judgment, if for the plaintiff, is, strictly speaking, interlocutory merely, until the damages have been assessed, yet, in our practice, it is governed by the same rules, as in the case of default, that is, judgment is rendered generally for the plaintiff, that he recover his debt or damages; and the subsequent assessment of these damages, however made, refers back to, and becomes part of the original judgment.²

And the assessment of the damages is made in the same manner as has been stated, in the case of *default*.³

¹ Vide supra Chapter on Costs.

² Vide ante Sect. I. of this Chapter.

³ Ibid.

2. *For defendant.* Judgment for the defendant, in all cases upon demurrer, is final, and that he recover his costs.

If in the same case, there should be *issues in law* upon demurrer, and also *issues in fact* to be tried by the jury, though the former should be first tried, according to the rules that have been stated,¹ yet final judgment will not be rendered in the case until the issues in fact have been disposed of. If the demurrer be determined in favor of the *plaintiff*, he may either strike out the counts upon which there are issues in fact, and take judgment upon the others, as in case of demurrer,²—or he may go to trial upon those counts, and the jury, if they find a verdict in his favor, will assess damages upon the whole declaration. But if the demurrer be determined in favor of the *defendant*, then the issues in fact must, of course, be tried, before the plaintiff can have any judgment: and if the verdict be against him, or he become nonsuit, before going to trial, the defendant will have judgment, for his costs.

On agreed statement of facts. Where the facts are agreed, it is usually a part of the agreement, that the plaintiff shall be nonsuited, or the defendant defaulted, according to the opinion of the court. If, therefore, the judgment be for the *plaintiff*, the proceedings, as to the judgment and the assessment of damages, — unless they are agreed, as they may be, — are the same as in case of *default*: if for the *defendant*, the same as in case of *nonsuit*.

¹ Vide ante page 220.

² *Fleming v. Langton*, 1 Strange. 532. *Duperoy v. Johnson*, 7 Term. Rep. 473.

SECT. IV. JUDGMENT UPON VERDICT.

If the verdict of the jury be in favor of the *plaintiff*, the judgment is for the amount of the verdict and costs; but if the jury find for the *defendant*, the judgment is for costs only, except in some cases of set-off.

Though the judgment for the plaintiff is generally for the amount of the verdict only, yet if the court, for any cause, delay entering up the judgment, when the plaintiff is not in fault, they will add interest to the amount of the verdict from the time it was given, to that of rendering the judgment, and make such further order, as that neither party shall suffer by the delay.¹

There may be two distinct judgments in the same action: as where the plaintiff appeals from the Court of Common Pleas, and recovers less than *one hundred dollars*, he is entitled to his judgment for the amount of damages given, and the defendant has another judgment for costs.²

Form of judgment. In all the preceding cases, the judgment, if for the plaintiff, follows the nature of the action. In actions of *assumpsit*, *covenant*, *trespass*, *case*, and the like, in which damages only are demanded, the judgment for the *plaintiff* is, that he recover his damages, as found by the verdict, or, in case of demurrer or default, to be duly assessed, together with his costs, if any be allowable:—in actions of *debt*, that he recover his debt, and damages, if

¹ *Perry v. Wilson*, 7 Mass. Rep. 393. *Brown v. Penobscot Bank*, 8 Mass. Rep. 445.

² Vide *supra* Chapter XXVII.

any, and costs : — in *real actions*, that he recover the premises demanded in his writ, and costs. In all these cases, if the *defendant* prevail, the judgment is, that he recover his costs merely, except in those cases, where he has filed and proved in set-off, a demand larger than that found due to the plaintiff, in which case, the defendant is entitled to judgment for the excess, as well as for his costs.¹

In *replevin*, the judgment for the *plaintiff* is, for his damages, which are usually nominal, as the goods demanded were delivered to him on the writ, and for his costs; for the *defendant*, the judgment is, for a return of the goods replevied, together with *six per cent.* on the amount of the replevin bond given by the plaintiff, as damages,² and also for his costs.

On the acceptance of a *report of referees*, the judgment of the court must conform to their award.³

Day of entering up judgment. A judgment may be entered on any day of the term, upon the motion of either party; in which case, the time of entering it must be minuted by the clerk upon the docket.⁴

But if no special award of judgment have been made upon motion, during the term, then, upon the last day of the term, judgment is rendered, as of that day, for the prevailing party, in all cases that have in any way, been finally determined, as a matter of course.⁵

¹ Stat. 1784. ch. 28. s. 12.

² Stat. 1789. ch. 26. s. 4. *Bruce v. Learned*, 4 Mass. Rep. 614.

³ *Nelson v. Andrews*, 2 Mass. Rep. 164. *Commonwealth v. The Pejepscut Proprietors*, 7 Mass. Rep. 399.

⁴ *Herring et al. v. Polley*, 8 Mass. Rep. 113. Reg. Gen. S. J. C. 32. Appendix A.

⁵ Reg. Gen. S. J. C. 32. Appendix A. 35th Rule C. C. Pleas, and *fourteenth* rule referred to therein. Appendix B.

The court will sometimes order a judgment to be entered, as of a term preceding the one, in which it is rendered, to prevent injustice being done. Thus, where after a cause had been continued by order of the court for advisement, the defendant in the action died, judgment was entered against him, as of the former term.¹ So, where a trustee process, after an examination of the trustee, was continued, and before the next term, both the principal defendant and the trustee died, the court charged the trustee, and entered judgment, as of the preceding term.²

Mode of procuring judgment. If the prevailing party wish judgment during the term, he has only to make a motion therefor; — if otherwise, he will have judgment, of course, on the last day of the term, if he be entitled to it.

It is the duty of the prevailing party in every suit, forthwith to file with the clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same be not so filed, within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not afterwards be recorded, unless upon a petition to the court at a subsequent term, and after notice to the adverse party, the court shall order it to be recorded; in which case it shall be considered as a judgment of the term, in which it was originally awarded.³

¹ *Perry v. Wilson*, 7 Mass. Rep. 393. *Brown v. Penobscot Bank*, 8 Mass. Rep. 445.

² *Patterson et al. v. Buckminster & Tr.* 14 Mass. Rep. 144.

³ Reg. Gen. S. J. C. 33. Appendix A.

CHAPTER XXVI.

EXECUTION.

Execution, according to Lord Coke, is the fruit, effect, and end of the law, and is the putting the sentence of the law in force.¹

An execution must strictly pursue the judgment, on which it issues, as to the parties, — the thing recovered, and if that be a debt or damages, the amount thereof. Therefore, if there be two or more judgment creditors, and one of them die, after judgment, and before execution issues, the execution may still be issued in the name of all, without regarding the death of any one.² But the court may direct it to issue in the name of the survivors alone.³

Time of issuing. The party obtaining a final judgment in any civil action, may take out his execution at any time after *twenty four hours*, after judgment rendered, and within *one year* next after the entering up of such judgment, provided no legal steps have been taken by the opposite party, to secure a further hearing.⁴ If he take out his execution within such times, and it be returned, at any time within a year from its being issued, either satisfied in part only, or wholly unsatisfied, he may take out, an *alias* or *pluries* execution, for the whole of the original amount, or

¹ Co. Litt. 184, 259.

² *Hamilton v. Lyman*, 9 Mass. Rep. 14.

³ *Bowdoin & ux. v. Jordan*, 9 Mass. Rep. 160.

⁴ Stat. 1783. ch. 57. s. 1. Stat. 1784. ch. 28. s. 15.

for what remains unsatisfied. And he may continue to have these *pluries* executions from year to year, until the whole judgment is satisfied.¹

But if the party neglect to take out his original execution, within a year after judgment, or to take out an *alias* or *pluries* execution, within one year after the return of the former execution unsatisfied, he must resort to a *scire facias*, to revive his judgment.²

If a party against whom judgment is rendered, be present at the taxation of the costs, by the clerk, — as he may be, — and appeal therefrom, the clerk cannot issue execution, until the question has been settled by a judge, according to usage.³

Mode of obtaining execution. If the party entitled to an execution, be the *plaintiff*, then having previously caused his damages to be assessed, in the manner already stated, and his costs to be taxed, as will be stated in the succeeding chapter, he simply applies to the clerk, within the time above mentioned, and upon furnishing him with the amount of damages and costs, he will be entitled to his execution, as a matter of course. If the prevailing party be the *defendant*, he has only to tax his costs, unless upon *set off* pleaded, he has obtained judgment for any excess, in which case, he furnishes the amount of his damages, in the same manner as if he were the plaintiff.

If either party, who has taken out an original execution, desire an *alias* or *pluries*, he must produce to the clerk the previous execution, with a return upon

¹ Stat. 1783. ch. 57. s. 1.

² Ibid. And vide ante page 68, 69. for some cases, in which a party may have an execution, notwithstanding more than one year has elapsed since the judgment.

³ *Winslow v. Hathaway et al.* 1 Pick. Rep. 211.

it, either by the party or his attorney, "that it has never been in the hands of an officer, and is therefore returned," either "wholly unsatisfied," or "satisfied in part only," according to the fact;—or with the officer's return thereon, "that it is wholly unsatisfied," or "satisfied in part only," according to the fact. Upon producing this, an *alias* or *pluries* execution will be issued for the whole amount, or for what remains unpaid. The previous execution must be thus returned to the clerk, before a new one can be taken out, because, in our practice, a party can have but one execution, at a time, against the same party, in the same case; though this is different in the English practice.¹

Where defendant is out of the Commonwealth. Before a plaintiff can take out an execution, against a defendant, who was not a resident or inhabitant within the Commonwealth, when the suit was commenced, and who, not returning before the trial, is defaulted, after the continuances required by law,—he must give a *bond*, with one or more sufficient sureties, in double the value of the estate or sum recovered, to make restitution, and to refund such sum, as shall be given in debt or damages, or so much as shall be recovered, upon a suit therefor, to be brought in one year, next after the entering up of the judgment.²

The clerk will require this bond, and it is generally made to the defendant.

The plaintiff, however, may avoid giving this bond, by causing the defendant who is out of the Commonwealth, to be served with an attested copy of the writ, and of the officer's return, at any time after the service

¹ 2 Tidd's Pract. 929.

² Stat. 1797. ch. 50. s. 5.

of the writ, and thirty days before the term when he takes judgment. Upon proving such notice, by filing in court, the deposition of one witness thereto, who is an inhabitant of the Commonwealth, he may have his execution in the usual manner.¹

In case of death of a party. If the party, against whom judgment is recovered, should die, before execution issues, an execution cannot be issued.² And if any property was attached upon the writ, it must be given up to the executor or administrator.³

But if the judgment-creditor should die after judgment, his representatives may take out execution, in his name.

Form of execution. In those *personal actions*, in which money only is demanded, as a debt or damages, and which are commenced by the writ of *original summons*, — *capias*, — *capias and attachment*, — or *summons and attachment*, we have, in our practice, but one form of execution. This form is given by Stat. 1784. ch. 28. and includes the *capias ad satisfaciendum*, — *feri facias*, — and *extendi facias* of the English practice.⁴

¹ Stat. 1797. ch. 50. s. 5. Vide also Stat. 1828. ch. 114.

² *Hildreth v. Thompson*, 16 Mass. Rep. 191. Vide Stat. 1822. ch. 93. s. 6.

³ Stat. 1822. ch. 93. s. 6.

⁴ *Ladd v. Blunt*, 4 Mass. Rep. 402. *Lyman v. Lyman et al.* 11 Mass. Rep. 317. *Davis et al. v. Richmond*, 14 Mass. Rep. 473.

Note. In the English practice, in actions where money only is recovered, as a debt or damages, there are *five* sorts of executions, namely: —

1. *Capias ad satisfaciendum*, which is against the *body* of the defendant.

2 *Fieri facias*, which is against his goods and chattels.

3. *Levari facias*, which is against his goods, and the *profits* of his lands.

4. *Elegit*, which is against his goods, and the *possession* of his lands.

5. *Extendi facias*, which is against his body, lands, and goods. Of these,

In other personal actions, which are commenced by the special writs, before enumerated,¹ — such as *trustee process*, *replevin*, &c. special executions, appropriate to the several actions, are given by the statutes prescribing the writs.

In *real actions*, the form of execution, in our practice, includes the *facias habere possessionem*, as to the land, and the *fieri facias*, as to the costs, and is given by *Stat. 1784. ch. 28*.

Against persons privileged from arrest. If an execution should be issued against any of those persons, who, as has been before stated, are privileged from arrest, the form of it should be altered, so as not to run against their bodies.²

Direction of executions. The same rules, which have been stated, as to the direction of original writs to officers, apply to the direction of executions. And though executions are generally directed to the same officers, who served the writ in the case, yet they need not be; but without reference to the writ, they may be directed, to officers qualified to serve them, in any or all the counties or towns of the Commonwealth, where service is required to be made.

So an *alias* or *pluries* execution may be directed, without any reference, to the preceding execution.³

Teste of execution. An execution may be sued out, bearing teste on any day, either in term time or vacation; and an *alias* or *pluries* may issue bearing

the *third* and *fourth*, are unknown in our practice, — and the remaining three, are included in the form referred to in the text.

¹ Vide ante Chap. VII. page 54.

² Vide ante Chapter XII. Sect. II. Stat. 1810. ch. 114. Stat. 1816. ch. 111. Stat. 1830. ch. 131. s. 3.

³ Vide ante Chapter VIII. Sect. II.

teste on any day within a year after the return day of the next preceding execution.¹ Executions should be dated on the day they are issued.²

Where executions should be made returnable. All executions should be made returnable to the court or justice, from whom they issue. And this should be so specified in the execution.³

When executions should be made returnable. Executions issuing from the *Supreme Judicial Court*, are made returnable to the next court holden in the county, if, by law, there be two terms holden there in a year. If there be but one term holden there, they are made returnable, in six months from their date, or to the next court, whichsoever may first happen.⁴

Executions issuing from the *Court of Common Pleas*, are made returnable to the next court, in all those counties where there are four terms of the court, in a year. Where there are less than four terms of the court in a year, they are made returnable in three months, or to the next court, if it shall sit within that time.⁵

Executions issuing from a justice of the peace, or a justices' court, must be made returnable, within sixty days from the day of issuing them.⁶

In all the above cases, the time when the executions are returnable, should be specified therein.⁷

¹ *Johnson v. Harvey*, 4 Mass. Rep. 483.

² *Hildreth v. Thompson*, 16 Mass. Rep. 191.

³ Stat. 1784. ch. 59. s. 2.

⁴ Stat. 1783. ch. 57. s. 1.

⁵ Ibid.

⁶ Ibid.

⁷ Stat. 1784. ch. 59. s. 2.

SECT. I. LEVY OF EXECUTION.

The execution having thus been legally taken out of the clerk's office, must be delivered to the officer, by whom it is to be served, executed and returned.

The mode of levying an execution has no necessary connexion with the manner in which the writ was served. Thus, though upon the writ, the defendant be arrested, and bail taken, yet the plaintiff may cause his execution to be levied upon real or personal estate, if he can find it, and *vice versâ*. So, though personal estate be attached on the writ, yet the plaintiff may levy his execution upon real estate, and *vice versâ*.¹

Upon what executions may be levied. The common execution in use in our practice, may, in all cases, be levied, either,

1. Upon the *body* of the person, against whom it issues, unless he be privileged from arrest, as stated under the head of the service of a writ as a *capias*,² or,

2. Upon his *real estate*, or,

3. Upon his *personal estate*.

The *exceptions* under the two last heads, that is *the estates in lands*, which are not liable to be seized on execution, — and the *personal estate* that is exempted from seizure, are the same as have been stated, in treating of the *attachment* of property on the writ.³

The judgment creditor when he delivers the execu-

¹ *Clark v. Goodwin*, 14 Mass. Rep. 237. *Herring et al. v. Polley*, 8 Mass. Rep. 113.

² Ante Chapter XII. Sect. II.

³ Ante Chapter XIII. Sect. II.

tion to the officer, should instruct him, in which of these modes he wishes his execution levied.

SECT. II. LEVY OF EXECUTION UPON THE BODY.

Time of levying. If the person, against whom the execution issues, were imprisoned on the writ, and remains so, at the time of judgment, the execution, — if it be intended to levy it on his body, — must be so levied, within *thirty days* after judgment, or he will then be discharged from imprisonment upon the writ.¹

But if the person be not imprisoned, at the time of judgment, or being so imprisoned, the execution be not levied upon him within *thirty days*, as above stated, it may be levied upon his body, at any time : with this qualification, however, that if he gave bail on the writ, the execution must be delivered to an officer, to be served and returned, within *one year*, or the bail will be discharged.² If he cannot be found, then the bail will be holden in the manner hereafter to be stated.

Mode of levying. In levying an execution upon the body of the person against whom it runs, the officer must take him into actual custody, and commit him to the county jail. The officer has no alternative, as in the case of serving a writ of *capias*.

Committal, — bond for jail limits, &c. When thus committed, the person either goes into close confinement, — or, if he please, he may have the jail limits, by giving bond to the creditor, with sufficient surety or sureties, in double the amount of the execution, conditioned to keep within those limits.³ And when

¹ Stat. 1784. ch. 28. s. 10.

² *Stevens v. Bigelow*, 12 Mass. Rep. 434.

³ Stat. 1811. ch. 85. s. 1. Stat. 1811. ch. 167. s. 1.

thus committed, he must so remain until discharged by the creditor, or by order of law.

Jail expenses, &c. If the person go into close confinement, he may claim of the jailor, support as a pauper, which the jailor is bound to furnish, within *twenty four hours* after such claim, at the expense of the creditor,¹ and within such twenty four hours, the jailor may call upon the creditor, or his attorney, to give security for such support, and if they do not, he may discharge the debtor, after the expiration of that time.²

But if instead of going into close confinement, he give bond, for the jail limits, the creditor is not bound to support him.

Poor debtors' oath, &c. If the person committed intend to discharge himself by taking the oath prescribed by law, the following proceedings must be had namely.

1. He must *complain* to the jailor, of his inability to support himself in prison.³

2. The jailor must then apply to some justice of the peace for the county in which the prison is.⁴

3. The justice applied to, must make out a notification in writing, under his hand and seal, to the creditor, signifying the debtor's intention to take the oath, and the time and place thereof.⁵

¹ Stat. 1821. ch. 22. s. 1.

² Ibid. s. 2. By Stat. 1819. ch. 94. s. 3. the *amount* for which the creditor is liable, for the support of the debtor in jail, is at the rate of \$1.25 *per week*; and by sect. 2. of same Stat. he is liable, at this rate, to any town, district, or to the Commonwealth, for any expense they may incur for the support of the debtor in close confinement.

³ Stat. 1787. ch. 29. s. 1.

⁴ Ibid.

⁵ Ibid.

4. Such notification must be served, by the sheriff, or his deputy, or a constable,¹ — upon the creditor, or if he be not in the Commonwealth, upon his attorney,² — or if neither be in the Commonwealth, it must be left with the clerk of the court, or the justice, by whom the execution was signed,³ *thirty days* before such intended caption.⁴

5. At the time and place appointed, the debtor must appear before two justices of the peace, both to be of the *quorum*, who examine him as to his property, and at which examination the creditor may appear and put questions.⁵ If the justices be satisfied, they admit him to take the *oath*,⁶ — and furnish their own *certificate* thereof,⁷ in the forms prescribed by law, and the debtor is then discharged; otherwise he still remains in confinement.

Subsequent liability of debtor. After the debtor has been thus discharged, his *body* can never be again taken for the same debt; but his *property* is always liable for the amount of the original judgment, and also for the expenses, which the creditor has incurred, in maintaining him in prison.⁸

¹ Stat. 1787. ch. 29. s. 1. Stat. 1811. ch. 85. s. 2.

² Stat. 1787. ch. 29. s. 1.

³ Ibid. Stat. 1819. ch. 130.

⁴ Ibid.

⁵ Stat. 1817. ch. 186. s. 1.

⁶ Stat. 1816. ch. 55.

⁷ Ibid.

⁸ Stat. 1787. ch. 29. s. 4. Stat. 1819. ch. 94. s. 2. Stat. 1821. ch. 22. s. 4.

SECT. III. LEVY OF EXECUTION UPON REAL ESTATE.

Time of levying. If the estate, upon which it is intended to levy the execution, were attached upon the writ, the levy must be made within *thirty days* after judgment, or the attachment will be void.¹ This time is fixed, merely as the limit, within which the creditor can preserve his lien upon the property originally attached; but if he do not wish to preserve it, or if no property were attached on the writ, he may levy his execution upon the debtor's estate, at any time while either his original execution, or any *alias* or *pluries* which he may take out, continues in force.

Mode of levying. Appointment of appraisers. When an officer has received an execution, with instructions to levy the same upon the real estate of the debtor, his first duty is, to cause three *disinterested and discreet* men, being freeholders in the county, to be selected, one to be chosen by the creditor or creditors, one by the debtor or debtors, whose land is to be taken, if they see cause, and a third by the officer: and in case the debtor neglect or refuse to choose, then the officer shall appoint one for him.²

If the inhabitants of a town, be a party to an execution, the appraisers cannot be chosen from such town.³

If an execution against two persons, be levied upon land, of which both are seized, an appointment of an

¹ Stat. 1784. ch. 28. s. 11. By Stat. 1806. ch. 107. in *Nantucket*, this lien upon property attached, continues for *sixty* days after judgment.

² Stat. 1783. ch. 57. s. 2

³ *Boston v. Tileston*, 11 Mass. Rep. 468.

appraiser, by either of them, is sufficient; but if the land be owned by one of them only, then he alone can appoint an appraiser, and an appointment by the other would vitiate the levy, as against any person claiming under the one who was seized.¹

If a party to an execution, be a spendthrift under guardianship, the guardian may appoint an appraiser on his part.²

If there be different parcels of land to be levied on, different appraisers may be appointed for each parcel.³

Oath of appraisers. The officer must then cause the appraisers so chosen, to be sworn before a justice of the peace of the same county, faithfully and impartially to appraise such real estate, as shall be shewn to them.⁴

If the appraisers be justices of the peace, they may administer the oath to each other; or the judgment-debtor, if a magistrate, may administer the oath to them,⁵ and for the same reason, it would seem, the creditor may do it.

It is not necessary that the magistrate, who administers the oath, should annex his certificate thereof, though it is often done; but the officer's return that they were duly sworn, will be sufficient.⁶

Appraisement. The appraisers having been thus duly chosen and sworn, must all of them,⁷ go upon

¹ *Herring et al. v. Polley*, 8 Mass. Rep. 113.

² *Bond v. Bond*, 2 Pick. Rep. 382.

³ *Boylston v. Carver*, 11 Mass. Rep. 515.

⁴ Stat. 1783. ch. 57. s. 2.

⁵ *Barnard v. Fisher*, 7 Mass. Rep. 71.

⁶ *Ibid.*

⁷ *Whitman v. Tyler et al.* 8 Mass. Rep. 284.

the land shewn to them, or, at least, view it,¹ and appraise the same, to satisfy the execution, with all fees, and set out the estate by metes and bounds,² if it be possible so to do.³

If several parcels of land be shewn to the appraisers, they may appraise each parcel separately, or the whole at one estimate.⁴ But the former course is the most convenient.

And it is sufficient, if two of the appraisers agree in the appraisement, provided all of them be present and act.⁵

Certificate of appraisers. It is not essential, that the appraisers should certify their doings on the execution, — though, in practice, they generally do so; — for the officer's return of their doings would be sufficient. But the practice of affixing their certificate, is a convenient one, and may correct an insufficiency in the officer's return.⁶

Delivery of seizin. The officer must then deliver possession and seizin of the lands so appraised, to the creditor or his attorney.⁷ This is done by going on to the land with the creditor or his attorney, and by some formal act, delivering him seizin by virtue of the execution.

¹ *Tate et al. v. Anderson*, 9 Mass. Rep. 92. *Bott v. Burnell*, 9 Mass. Rep. 96. *Same v. Same*, 11 Mass. Rep. 163. *Bond v. Bond*, 2 Pick. Rep. 382. *Hammatt v. Bassett*, 2 Pick. Rep. 564.

² Stat. 1783. ch. 57. s. 2.

³ *Ibid.* s. 3.

⁴ *Barnard v. Fisher*, 7 Mass. Rep. 71. *Bond v. Bond*, 2 Pick. Rep. 382.

⁵ *Moffitt v. Jaquins et al.* 2 Pick. Rep. 331.

⁶ *Williams v. Amory*, 14 Mass. Rep. 20.

⁷ Stat. 1783. ch. 57. s. 2.

The attorney who receives seizin, need not have been appointed by deed, but the attorney of record in the suit, may receive it.¹ And if the seizin be delivered to any person, who undertakes to act for the creditor, a subsequent ratification on the part of the creditor, by any act, such as causing the execution to be recorded, will make the levy valid.²

The delivery of seizin to the creditor, must be made in a reasonable time after the levy. In one case, where it was delayed for a month, the court held the levy void.³

Officer's return of execution. After the foregoing proceedings have been had, the officer must make a return of the execution, with his doings thereon, to the clerk's office, whence it issued.⁴

The precise *time*, when this return must be made to the clerk's office, is not fixed by the statute, — but it is provided that the execution must be recorded in the registry of deeds, within *three months* after the levy.⁵ Accordingly it has been holden, that if the return day named in the execution, fall *within* the time allowed by law for the recording of the executions, the officer is bound to return it to the clerk's office on the return day, in order that the creditor may there find it, to have it recorded.⁶ But if the three months expire *before* the return day of the execution, the creditor must request the officer to return

¹ *Pratt et al. v. Putnam*, 13 Mass. Rep. 361.

² *Ibid.*

³ *Waterhouse v. Waite*, 11 Mass. Rep. 207.

⁴ Stat. 1783. ch. 57. s. 2.

⁵ *Ibid.*

⁶ *McGregor et al. v. Brown*, 5 Pick. Rep. 170.

the execution, or to deliver it to him, — which the officer may lawfully do, — before he can make him liable.¹

In the return of the officer, every thing required by the statute, to pass the property, must be stated,² — the date of the levy,³ — the names of the appraisers,⁴ — by whom they were respectively chosen,⁵ and if the officer chose two of them, the reason for so doing,⁶ — that the appraisers were discreet and disinterested men, and freeholders in the county, where the land levied upon lay,⁷ — that they entered upon, or viewed the land appraised,⁸ — the sum for which they appraised it, and the metes and bounds by which they set it forth, for which two facts, however, he may simply refer to the appraisers' certificate, if they annex one, as is usual,⁹ — and that he delivered seizin thereof to the creditor or his attorney.¹⁰

Recording execution. After the foregoing proceedings have been had, the creditor, either before or after the return of the execution to the clerk's office, but within *three months* from the time of the levy, must cause the execution, with the officer's return

¹ *Tobey v. Leonard*, 15 Mass. Rep. 200. Vide *Prescott v. Petlee et al.* 3 Pick. Rep. 331.

² *Williams v. Amory*, 14 Mass. Rep. 20.

³ *Shove v. Dow*, 13 Mass. Rep. 529.

⁴ *Nye v. Drake*, 9 Pick. Rep. 35.

⁵ *Allen v. Thayer*, 17 Mass. Rep. 299.

⁶ *Eddy v. Knap*, 2 Mass. Rep. 154. *Whitman v. Tyler et al.* 8 Mass. Rep. 284.

⁷ *Williams v. Amory*, 14 Mass. Rep. 20. And vide *Lobdell v. Sturtevant*, 4 Pick. Rep. 243.

⁸ *Tate et al. v. Anderson*, 9 Mass. Rep. 92. *Bond v. Bond*, 2 Pick. Rep. 382. *Hammatt v. Bassett*, 2 Pick. Rep. 564.

⁹ *Shove v. Dow*, 13 Mass. Rep. 529.

¹⁰ *Boylston v. Carver*, 11 Mass. Rep. 515.

thereon, to be recorded in the registry of deeds for the county where the land lies, — and having so done, he will have as good a title thereto, as the debtor had.¹

This *registry* is not necessary, as against the debtor and his heirs, — but only as against subsequent attaching creditors, or purchasers.² And the officer who levies the execution is, in no case, officially bound to make it, but the creditor must look to it himself.³

Upon rents and profits. When the real estate extended upon, cannot be divided and set out by metes and bounds, then the execution must be extended upon the rents and profits of the estate.⁴

The same proceedings are had, as in a levy upon the fee, only that the appraisement is made, and the seizin given, of the rents and profits, instead of the fee. The officer may, also, cause the person in possession and improvement of the land, to attorn and become tenant to the creditor, and to pay the rent to him, and if he refuse, may turn him out, and give seizin and possession to the creditor.⁵

Upon lands held in joint-tenancy, — tenancy in common, &c. If the lands levied on, be owned by the debtor, in joint-tenancy, tenancy in common, or coparcenary, with others, the officer must levy the execution upon the debtor's share in the whole

¹ Stat. 1783. ch. 57. s. 2.

² *M'Lellan v. Whitney*, 15 Mass. Rep. 137. *Ladd v. Blunt*, 4 Mass. Rep. 402.

³ *Waterhouse v. Waite*, 11 Mass. Rep. 207. *Tobey v. Leonard*, 15 Mass. Rep. 200. *M'Gregor et al. v. Brown*, 5 Pick. Rep. 170.

⁴ Stat. 1783. ch. 57. s. 3.

⁵ *Ibid.*

estate, and not upon any particular portion of the estate.¹

The proceedings are the same, as in levying upon the fee, before stated. The officer must describe the estate, in his return, with as much precision as possible, and give the creditor seizin of the debtor's interest therein, in common with the other tenants.²

Upon remainders, and reversions. Executions may be levied upon remainders or reversions of the debtor; and the proceedings are the same, as in levying upon the fee.³

Upon estates for life. Executions may be levied upon estates for life, as in *curtesy, dower, &c.* either by a levy upon the land, or upon the rents and profits,⁴ the proceedings in both which cases, have been stated.

On terms for years. An execution cannot be levied upon a term for years, in the manner prescribed by statute, for levying on real estate, but the term must be sold, as a *chattel*.⁵

Upon equities of redemption. Equities of redemption have been made liable to attachment, and to seizure and sale on execution, in this commonwealth, by statute.⁶

¹ Stat. 1783. ch. 57. s. 2. *Bartlet v. Harlow*, 12 Mass. Rep. 348. *Baldwin v. Whiting et al.* 13 Mass. Rep. 57. *Atkins v. Bean et al.* 14 Mass. Rep. 404.

² Ibid. By Stat. 1818. ch. 115. s. 1. the same course may be taken with *mills, &c.* which cannot be divided, or the whole of which are not needed to satisfy the execution.

³ *Williams v. Amory*, 14 Mass. Rep. 20.

⁴ *Barber v. Root*, 10 Mass. Rep. 260. *Chapman v. Gray*, 15 Mass. Rep. 439. *Roberts v. Whiting*, 16 Mass. Rep. 186.

⁵ *Chapman v. Gray*, 15 Mass. Rep. 439.

⁶ Stat. 1783. ch. 57. s. 4. Stat. 1798. ch. 77. s. 4.

Notice. In levying an execution upon an equity of redemption, whether it were attached on the writ, or not, the officer having fixed upon a time and place of sale, must give notice thereof, in writing, to the debtor in person, or by leaving the same at his last and usual place of abode,¹ and public notice thereof, by posting up notifications in two or more public places in the town, &c. where the mortgaged estate is situated, and also in one or more public places in two adjoining towns, *thirty days* at least, before the time of sale; and he must further cause an advertisement of such time and place of sale, to be published *three weeks* successively, before the day of sale, in some public newspaper, printed in the county in which such real estate lies, if any such newspaper be there printed.²

Sale. At the time and place appointed, the officer must proceed to make sale of the equity, at public vendue; but if the estate shall not then be disposed of, he may adjourn the sale, not exceeding *three days*, and so, from time to time, until the sale shall be completed.³

Deed. The officer must then convey the equity of redemption to the purchaser, by deed, which, if the proceedings have been regular, will be as effectual to convey the same, as if made by the debtor.⁴

Officer's return of execution. The officer having made sale of the equity, and applied the proceeds upon

¹ By *Stat. 1828. ch. 117.* if the judgment debtor be not an inhabitant of, or resident in the Commonwealth, this notice in writing, either to him in person, or by being left at his last and usual place of abode, is dispensed with. But the *public notice* must still be given, as above.

² *Stat. 1798. ch. 77. s. 4.*

³ *Ibid.*

⁴ *Ibid. s. 5.*

the execution, must make a return of his execution, at the time and place specified therein. His return upon the execution must specially set forth all his doings, in what manner he notified the debtor, or the reason why he did not notify him,—in what places, and in what newspaper, he gave the public notice,—the proceedings of the sale, the proceeds, and his application thereof to the execution. A mere general return that he proceeded according to law, is not sufficient.¹

If the equity were attached on the writ, the attachment continues in force for *thirty days* after judgment: and in order to preserve the lien, all the proceedings previous to the sale, must be had within that time, but the sale may be made after that time.²

If, after an equity of redemption has been attached on mesne process, and pending the attachment, the mortgagor redeem the estate, the creditor may levy his execution upon the fee,³ in the manner already stated.

Upon betterments. By *Stat. 1818. ch. 115. s. 2.* all the right, title and interest which any person has in the betterments of land, of which he has been in the possession and improvement, for *six years*, before the commencement of an action against him, to recover the same,—the value of which betterments he has a right, to have assessed by the jury, which tries such action,⁴—may be taken by attachment, or on execution. And when so taken on execution, the same

¹ *Davis v. Maynard*, 9 Mass. Rep. 242. *Wellington v. Gale*, 13 Mass. Rep. 483.

² Stat. 1798. ch. 77. s. 4.

³ Stat. 1815. ch. 137. s. 3.

⁴ Stat. 1807. ch. 75. s. 3.

notice must be given, and the same proceedings had, as are required by law, in the sale of an equity of redemption.

On pews. For the *notice* necessary in levying executions upon *pews*, reference may be had to what has been stated as to the manner of *attaching* them; in other respects the proceedings are the same, as in levying upon any other real estate, except in the city of Boston, where pews are personal property.¹

SECT. IV. LEVY OF EXECUTION UPON PERSONAL ESTATE.

Time of levying. The rule before stated,² as to the *time* of levying executions upon real estate, applies to a levy upon personal property.

Mode of levying. If the property was attached on mesne process, and then sold, — as we have seen it may be,³ — the officer has only to apply the proceeds upon the execution, and make his return accordingly.

But if the execution is to be levied upon goods or chattels, whether they were attached on the writ, or not, the officer must safely keep them, at the expense of the debtor, for the space of *four days* next after seizing them. If the owner do not redeem them within that time, by satisfying the execution, the officer must proceed to sell them at public vendue, after having posted up notifications of the time and place of sale, in the town or ~~place~~ where the sale is to be had, *forty*

¹ Vide ante page 167, 168.

² Vide ante page 284.

³ Vide ante page 175.

eight hours, before the expiration of the four days.¹ If he do not comply with these requisites, his special property acquired by the seizure, will be lost, and the goods may be attached, or seized on execution, by other creditors.² But except as against other creditors, he may sell after the fourth day, and satisfy his execution with the proceeds of the sale; but he will be liable to the debtor for any damage sustained by the irregularity.³

Officer's return. The officer having thus seized and sold the property, and applied the proceeds upon the execution, must make return thereof with his doings, particularly describing the goods taken and sold, and the sum for which each article was struck off, and the disposition made of the proceeds.⁴

Upon shares in incorporated companies. Executions must be levied upon shares in incorporated companies, created *before* the passage of *Stat. 1804. ch. 83.* in the manner prescribed by that statute.⁵ But shares in corporations, created *since* that statute, may be levied upon in the modes prescribed in their several acts of incorporation.⁶

By the general statute above named, if the shares were attached on the writ, as before stated,⁷ and the creditor intend to preserve the lien created by the attachment, the officer must within *thirty days*

¹ Stat. 1783. ch. 57. s. 5.

² *Lane et al. v. Jackson*, 5 Mass. Rep. 157. *Warren v. Leland*, 9 Mass. Rep. 265. *Howe v. Starkweather*, 17 Mass. Rep. 240.

³ Ibid.

⁴ Stat. 1783. ch. 57. s. 5.

⁵ *Howe v. Starkweather*, 17 Mass. Rep. 240.

⁶ *Titcomb v. Union Mar. and Fire Ins. Co.* 8 Mass. Rep. 326.

⁷ Vide ante page 173.

after judgment, leave an attested copy or copies of the execution, with the clerk and treasurer, or cashier of the corporation, and also, within that time, cause an advertisement of the time and place of sale, to be at least once published. These proceedings will constitute a *seizure* upon the execution.¹

The officer must then proceed to notify the debtor, and to give public notice of the time and place of sale, within the time and in the mode prescribed by the statute,² which are the same, as upon the sale of an equity of redemption before stated.³

The officer making the sale, or the purchaser, must, *within fourteen days* after the sale, leave an attested copy or copies of the execution, and of the officer's return thereon, with the clerk and treasurer, or cashier, and pay for the recording of the same;— and the proper officer of the corporation will then be bound to issue to the purchaser, legal certificates of the shares so sold.⁴

If the shares to be levied on, were not attached on the writ, the same proceedings are still to be had, on the execution, whenever it may be levied.

These proceedings must necessarily be had within *thirty days* after judgment, only for the purpose of preserving the lien upon the shares, created by the attachment. If they were not attached on the writ, or if the creditor do not wish to preserve his lien, the execution may be levied upon them, at any time.

Upon personal property owned in joint-tenancy,

¹ Stat. 1804. ch. 83. s. 2.

² Ibid. s. 3.

³ Vide ante page 290.

⁴ Stat. 1804. ch. 83. s. 1.

— *tenancy in common*, — or *copartnership*. For the mode of levying executions upon personal property, holden in common, &c. reference may be had to the manner of attaching it.¹

Upon personal property mortgaged or pledged.
See mode of *attaching* the same.²

¹ Vide ante page 173.

² Vide ante page 174.

CHAPTER XXVII.

COSTS.

SECT. I. IN ACTIONS AT COMMON LAW.

When in general recoverable. By Stat. 1784. ch. 28. s. 9. it is provided, that in all actions, the party prevailing shall be entitled to his legal costs against the other; and by the same *section*, if the plaintiff at any stage of his suit, become nonsuit, or discontinue his action, the defendant shall recover costs.

Where, after entry of the action in the Court of Common Pleas, the writ was lost, and the court on motion directed the clerk to record the action as a *misentry*, it was decided by the Supreme Court, that the defendant should recover costs.¹ It appears, however, from the statement in the opinion of the court, in the case last cited, that the writ was never returned, but had been lost by the sheriff, who served it. Had it been lost after being returned, without the plaintiff's fault, the decision might have been different.

If judgment be arrested, the defendant is entitled to costs as the prevailing party.

If the writ be abated by plea, or on motion, for any defect or insufficiency, the defendant recovers costs.²

¹ *Gilbreth v. Brown et al.* 15 Mass. Rep. 178.

² *Haines v. Corliss*, 4 Mass. Rep. 659. *Thomas v. White*, 12 Mass. Rep. 370. *Hart v. Fitzgerald*, 2 Mass. Rep. 509. *Guild v. Richardson*, 6 Pick. Rep. 364.

But the defendant will not recover costs, where the writ is abated by the death of one of the plaintiffs.¹ The case of *Fowler et ux. v. Shearer*,² where in trespass, after verdict for defendant, subject to the opinion of the court, and before judgment, the wife died, and the defendant had judgment for his costs against the husband, seems inconsistent, with the case of *Cutts et al. v. Haskins*, and may be considered overruled by it.

Nor will costs be allowed, where an action is dismissed for want of jurisdiction.³ But if the court have general jurisdiction of the subject, and the want of jurisdiction in the particular case, is ascertained upon the plea, the case comes within the general rule, and costs are allowed.⁴

In several actions by a promisee upon a joint and several promissory note, against the promisers, although the plaintiff can have but one satisfaction of his damages, he may have satisfaction for his costs against each promiser.⁵

In actions on bonds with penalties, if a forfeiture be adjudged, or if the defendant confess it, and is heard in equity, the plaintiff is considered as the prevailing party, although on the hearing it appears that nothing is due.⁶

In an action of replevin, if part of the property replevied, be found to belong to the plaintiff, and part

¹ *Cutts et al. v. Haskins*, 11 Mass. Rep. 56.

² 7 Mass. Rep. 31.

³ *Thomas v. White*, 12 Mass. Rep. 370. *Williams v. Blunt*, 2 Mass. Rep. 207. *Clark v. Rockwell, et al.* 15 Mass. Rep. 221.

⁴ *Thomas v. White*, 12 Mass. Rep. 370.

⁵ *Simonds v. Center*, 6 Mass. Rep. 18.

⁶ *Lyman v. Warren*, 12 Mass. Rep. 412.

to the defendant, each party will be considered as prevailing, and will recover costs.¹

Where the holder of a promissory note commences several actions at the same time, against the maker and indorsers, and recovers judgment and satisfaction in one action, pending the others, he cannot have judgment for his costs in the others, but is liable to pay costs.²

In actions *ex contractu* against several defendants, the plaintiff can have costs against neither, unless he prevail against all.³

If a creditor of an insolvent estate claim more than the commissioners of insolvency allow, and bring his action at law, if he do not recover more than the commissioners allowed, the administrator will be considered the prevailing party, and will recover costs.⁴

The plaintiff on record is the party against whom the judgment for costs is to be rendered, although he be a mere trustee suing in *autre droit*, as executor, administrator, guardian, or even an infant, suing by his *prochien ami*.⁵

In actions on probate bonds brought for the benefit of heirs, or legatees, or creditors, they are considered as the real plaintiffs, and the judgment for costs is against them.⁶

In actions against executors and administrators, the

¹ *Powell v. Hinsdale*, 5 Mass. Rep. 343.

² *Gilmore v. Carr*, 2 Mass. Rep. 171. Vide *Porter v. Ingraham*, 10 Mass. Rep. 88.

³ *Galloway v. Pitman et al.* 3 Mass. Rep. 408. *Tuttle v. Cooper et al.* 10 Pick. Rep. 281.

⁴ *Dodge et al. v. Breed*, 13 Mass. Rep. 537.

⁵ *Smith v. Floyd*, 1 Pick. Rep. 275.

⁶ *Robbins v. Hayward*, 16 Mass. Rep. 524. *Dawes v. Gooch*, 8 Mass. Rep. 488.

judgment for costs must be against the estate, and not against the defendants personally.¹

But where the commissioners of insolvency allowed a part of a creditor's claim, and the administrator signified his dissatisfaction at the allowance as made, so that the creditor was driven to his suit at law, and on the trial of the action, he recovered more than the commissioners allowed, it was holden that the plaintiff should recover costs against the administrator *de bonis propriis*.²

If an executor or administrator fail in a suit commenced by him in that capacity, he will be personally liable to the defendant for his costs;³ but if an executor or administrator prosecute an action commenced by the deceased, and the defendant prevail in the suit, judgment for costs must be rendered, against the estate of the deceased, in the hands of the executor or administrator, and not *de bonis propriis*.⁴

Overseers of the poor are mere agents for the town by which they are chosen, if therefore, they fail in a complaint preferred for the removal of a pauper, costs may be awarded to the respondents against the town, but not against the overseers.⁵

The *Stat.* 1784. *ch.* 28. *s.* 12. creates an exception to the rule, that the prevailing party shall be entitled to costs, where the plaintiff brings divers actions upon demands which might have been joined in one suit, in which he shall recover costs in one action only.

¹ *Alkins et al. v. Sawyer*, 1 Pick. Rep. 351.

² *Burns et al. v. Fay*, S. J. C. Suffolk, March T. 1833. *Healy v. Root*, 11 Pick. Rep. 389.

³ *Hardy v. Call*, 16 Mass. Rep. 530.

⁴ *Stat.* 1783. *ch.* 32. *s.* 10. *Brooks et al. v. Stevens*, 2 Pick. Rep. 68.

⁵ *Buckfield v. Gorham*, 6 Mass. Rep. 445.

This provision of the statute applies to those cases only, where the same plaintiff, at the same term, sues the same defendant in several actions, upon demands, which might have been joined in one suit, and where the actions are *ex contractu*.¹

If goods attached on several writs, in favor of several plaintiffs, be replevied by several writs of replevin, sued out in favor of the same party, on each of which a bond is given to the officer, and he bring a separate action on each bond at the same court, he will be allowed costs in each suit, the statute giving him these bonds, in trust for the attaching creditors respectively.²

If an action be commenced to recover a debt, and the defendant be summoned as the trustee of the plaintiff, in another action, and be charged as such, and pay the debt over on execution, the plaintiff's action will be defeated, but neither party will recover costs.³

It is not perceivable how this decision can be sustained by any just construction of the statute, which unequivocally provides, that in all actions, the party prevailing shall be entitled to his legal costs against the other. In *Jones v. Foster*,⁴ the court say, that the payment on the execution recovered in the trustee suit, discharges the plaintiff's demand, and operates as payment to him. Payment to the plaintiff, would have been a good defence, to the action, if made only the day before the trial, and as prevailing party in such case, the defendant would be entitled to his costs,

¹ *Simonds v. Center*, 6 Mass. Rep. 18. *Ripley v. Chandler*, 10 Mass. Rep. 175.

² *Morse v. Hodson et al.* 5 Mass. Rep. 314.

³ *Ibid.*

⁴ 15 Mass. Rep. 185.

unless such payment was made in settlement, and satisfaction of the action; — so in the case last cited, the defendant must be considered as the prevailing party, and as such, it would seem, is entitled to his costs.

Where there are several defendants. In actions of tort, where several defendants sever in their pleas, each of those who are acquitted, recover costs for their travel, attendance, and attorney's fees, by force of the statute,¹ which provides that in all cases, the party prevailing shall recover costs; but for all charges jointly incurred, as fees of witnesses, costs of depositions, &c. single costs only can be taxed.²

So in an action *ex delicto*, against two or more, if a verdict be found against a part, and in favor of part, those who are acquitted, will be entitled to their costs, although they did not sever in their pleas, the verdict operating as a severance.³

Where several defendants in an action of trespass, plead jointly in the court below, and severally on the appeal, those who are acquitted, will be entitled to joint costs to the time of severing in their pleas, and to several costs afterward, and the costs jointly incurred, may be apportioned.⁴

In actions *ex contractu*, the rule, however, is different, and though several defendants sever in their pleas, and a verdict be rendered in their favor, they will be entitled to but one bill of costs.⁵

¹ Stat. 1784. ch. 28.

² *Mason v. Waite et al.* 1 Pick. Rep. 452.

³ *Brown v. Stearns et al.* 13 Mass. Rep. 536.

⁴ *West v. Brock et al.* 3 Pick. Rep. 303.

⁵ *Meagher v. Batchelder et al.* 6 Mass. Rep. 444. *Ward v. Johnson et al.* 13 Mass. Rep. 148.

Where an action is brought against several, and the plaintiff obtains a verdict, the costs are, in all cases, taxed jointly against whom the verdict is rendered.¹

Double costs. By *Stat.* 1784. *ch.* 28. *s.* 13. it is provided that when the plaintiff and defendant both live within the Commonwealth, all personal and transitory actions, shall be brought in the county where one of the parties lives; and when an action shall be commenced in any other county, than as above directed, the writ shall be abated, and the defendant allowed double costs.

By *Stat.* 1820. *ch.* 79. *s.* 5. when a party alleging exceptions to the opinion, direction, or judgment of the Court of Common Pleas, in any matter of law, shall fail to enter the action in which such exceptions are made, at the first succeeding term of the Supreme Judicial Court, for the same county, and complaint thereof shall be made by the adverse party; or whenever the Supreme Court shall allege such exceptions to be frivolous, and intended only for delay, the Supreme Court shall award double the costs of that court, against the party making the same.

By *Stat.* 1822 *ch.* 105. double costs are allowed to plaintiffs, where a defendant appeals from the judgment of the Court of Common Pleas, where the debt or damage recovered, was less than *one hundred dollars*, if the same be not reduced on the appeal.

¹ Vide *Prop. Kennebec Pur. v. Boulton et al.* 4 Mass. Rep. 419.

SECT. II. IN SPECIAL PROCEEDINGS.

1. *Upon trustee process.* — *As between the plaintiff and defendant.* The same rules prevail, in the taxation of costs, as at common law.¹ If the defendant make default, however, or if the suit be determined by verdict, or otherwise, as against him, the plaintiff will recover further costs of travel, attendance, &c. until the termination of the suit against the trustee, although he may ultimately be discharged.²

When the trustee shall be allowed costs. By *Stat. 1794. ch. 65. s. 3.* if any person summoned as a supposed trustee, shall come into court, at the first term, and declare that he has not in his hands, or possession at the time of the service of the writ, any goods, effects, or credits of the principal, and thereupon submit himself to an examination upon oath, if upon such examination, the declaration appear to be true, the court shall award to him his legal costs.

By *Stat. 1829. ch. 128. s. 2.* any person summoned as trustee, may retain from the amount adjudged to be in his hands, a sufficient sum to pay his reasonable counsel fees, and other necessary expenses, occasioned by his being summoned as trustee; the amount to be retained, and the necessity of employing counsel to be determined by the court.

If a supposed trustee appear at the first term, and submit himself to an examination, and the plaintiff fail in the action against the defendant, the trustee

¹ *Denham v. Lyon et Tr.* 1 Mass. Rep. 15.

² *Wells et al. v. Banister et al.* 4 Mass. Rep. 515.

will be entitled to his costs, whether he admit or deny his liability as trustee.¹

If one, summoned as trustee, be absent at the time of the service of the writ, and also at the first term of the court, so that he cannot then come in and submit himself, and he comes in at the first term after his return, he will be entitled to costs under the equity of the statute.²

It is not necessary, in order to entitle the trustee to costs, that he should make oath to his general answer, containing a mere denial of effects; if an examination under oath be intended, the oath is generally administered at the close of the examination.

The object of the statute is to prevent any delay on the part of the trustee in making his answer, by making his title to costs depend upon his presenting himself for examination at the first term.³

If, however, no further interrogatories be put during the term, or if the plaintiff be satisfied with the general answer, it would seem that to entitle the trustee to be discharged, and to have his costs, he must make oath to it, during the term, in which his answer is filed.⁴

Where the trustee's liability is determined by a trial at law, upon the validity or effect of an assignment, disclosed by him in his answer, it is provided by *Stat. 1817. ch. 148. s. 1.* that the court may award legal

¹ *Brown v. Seymour & Tr.* 1 Pick. Rep. 32. *Wilcox v. Mills*, 4 Mass. Rep. 218. *Cleveland v. Clap et al.* 5 Mass. Rep. 208. Stat. 1794. ch. 65. s. 4.

² *Turo v. Coates & Trs.* 10 Mass. Rep. 25.

³ *Chapman v. Phillips*, 8 Pick. Rep. 24.

⁴ *Ibid.* Vide *Cleveland v. Clap et al.* 5 Mass. Rep. 207.

costs, for and against any of the parties, at its discretion.

By *Stat. 1794. ch. 65. s. 3.* if a supposed trustee, resident without the county, to which the writ is returnable, discharge himself upon examination, the court shall award to such trustee, such further costs, as with his legal costs, shall, under all the circumstances of the case, be a reasonable compensation to him for his time and expenses, in appearing and defending himself against the suit.

If in such case, the trustee do not submit himself to an examination at the first term, but is discharged on examination at a subsequent term, before judgment be rendered against the debtor, he shall have his costs.¹

A person, summoned as trustee, resident in another county, than where the writ is returnable, shall not be liable to pay costs upon the original process.²

When the trustee shall pay costs. By *Stat. 1794. ch. 65. s. 3.* where a person summoned as trustee, resident within the county in which the writ is returnable, shall neglect to appear at the first term, and submit to an examination, having in the opinion of the court, no reasonable cause to the contrary, he shall be liable for all costs, afterwards arising in such suit, to be recovered and paid out of his own goods and estate, in case judgment shall be finally rendered for the plaintiff, unless such costs shall be satisfied from the estate of the principal. If there be more than one trustee who shall so neglect to appear, they will be jointly liable to such costs.

¹ *Cleveland v. Clap et al.* 5 Mass. Rep. 208. but quære. Vide *Stat. 1794. ch. 65. s. 3, 4.*

² *Stat. 1794. ch. 65. s. 3.*

The intention of this provision of the statute, is “to mulct a supposed trustee, when by his negligence in submitting to an examination, the creditor has been at expense in prosecuting a fruitless suit against his debtor. But if the creditor be indemnified as to the costs out of the debtor’s effects, whether in his own hands, or in the hands of any trustee, the intent of the statute is satisfied.”¹

How judgment for costs is rendered. Each trustee, summoned in the writ, who duly appears, and is discharged, with an allowance of costs to him, is entitled to a separate judgment and execution for them.²

If there be several trustees in the same writ, who are mulcted in costs for not appearing and answering, under the provisions of the statute, judgment and execution will be awarded against them jointly, for such costs.³

2. *Scire facias against trustees.* If the plaintiff fail in his action of *scire facias* against the trustee, because he has, in fact, discharged himself by delivering over all the effects of the debtor in his hands, upon the original execution, the trustee will be entitled to his costs.⁴

If a trustee, residing out of the county, upon *scire facias* brought against him, be examined and discharged, he will recover costs.⁵

If a supposed trustee, summoned out of his county, be defaulted on the original process, and on the *scire facias*, plead in abatement of the writ, a plea which

¹ Per Parsons C. J. *Cleveland v. Clap et al.* 5 Mass. Rep. 208.

² Stat. 1794. ch. 65. s. 4.

³ Ibid. s. 3.

⁴ *Cleveland v. Clap et al.* 5 Mass. Rep. 208.

⁵ Stat. 1794. ch. 65. s. 6.

is overruled, and he be afterwards discharged on his examination, he will recover costs for the term only at which he was discharged.¹

The costs of the suit on the *scire facias*, where the defendant is resident within the county, and is charged as trustee, are recoverable against him; but not the costs of the original suit;² so where upon *scire facias*, he is examined and discharged, judgment will be rendered against him for costs.³

Where the trustee, resident within the county, has no reasonable excuse for not appearing and answering at the first term upon the trustee process, but is finally discharged, either upon the original writ, or upon *scire facias*, the court may order him to pay out of his own estate, all the costs arising to the plaintiff in the original suit, after the first term, and until he shall submit to an examination, provided the plaintiff do not obtain satisfaction of the same against the defendant out of effects in his own hands, or in those of any trustee.⁴

3. *In scire facias against bail.* By Stat. 1784. ch. 10. s. 2. "when the principal shall avoid, so that his goods, lands or chattels cannot be found to satisfy the execution, nor his body found to be taken therewith, the plaintiff shall be entitled to his remedy by *scire facias*, against the bail. And in case no just cause to the contrary be shewn, judgment shall be given against them for the damages and cost recovered against the principal, with additional damages and costs, and execution shall be awarded against them accordingly. *Provided, nevertheless*, that if the bail shall

¹ *Wilcox v. Mills*, 4 Mass. Rep. 507.

² *Rivers v. Smith*, 1 Pick. Rep. 164.

³ Stat. 1794. ch. 65. s. 6.

⁴ *Cleveland v. Clap et al.* 5 Mass. Rep. 209.

bring their principal into court, before judgment is given upon the *scire facias*, and there deliver him to the order of the court, and shall pay the costs which may then have arisen upon the *scire facias*, then the bail shall be discharged, and the principal shall be committed to the goal, there to remain for the space of thirty days, in order to his being taken in execution."

The bail are not discharged by surrendering the principal into court, until the costs are paid.¹

By *Stat. 1817. ch. 146.* bail may discharge themselves by surrendering their principal before judgment to the goal, upon *scire facias* against them, in the manner prescribed by the statute, and if the commitment be made after the *scire facias* has issued, the bail must pay the costs which has accrued thereon, before they will be discharged.

4. *Before justices of the peace, and in appeals therefrom.* Justices of the peace have original jurisdiction in all personal actions, where the sum demanded does not exceed *twenty dollars*, and costs are awarded to the prevailing party, upon the principles and rules governing the subject of costs generally.²

In all civil actions, triable before a justice of the peace, an appeal lies to the Court of Common Pleas;³ if the appeal be entered, the costs before the justice, abide the event of the suit, in the same manner, as if the action had been commenced in the court appealed to.

If the appellant fail to enter the action in the court,

¹ *Bartlet v. Falley*, 5 Mass. Rep. 373.

² Vide Taxation of costs, Sect. III. *supra*.

³ Stat. 1783. ch. 42. s. 6.

to which the appeal is made, the appellee, on complaint thereof, may have the judgment appealed from, affirmed by the court to which the appeal is made, with his costs, and execution will issue from the Court of Common Pleas in the same manner, as upon judgments in actions originally commenced in, and cognizable by that court.¹

5. *In courts of probate, and in appeals therefrom.* Costs are not allowed in this court.²

In cases of *appeals* from this court to the Supreme Judicial Court, in its capacity of Supreme Court of Probate, the *Stat.* 1817. *ch.* 190. *s.* 7, 44. provides that the court may assess reasonable costs, to either party upon the appeal, or against the appellant, who shall fail to enter his appeal, upon complaint thereof, by the appellee, for affirmation of the judgment appealed from. The *Stat.* 1817. *ch.* 190. is the same in words, as to the subject of costs, as the former *Stat.* 1783. *ch.* 46. repealed by it. Under the last cited statute, it was holden, that, as no costs are allowed before a Judge of Probate, the Supreme Court do not generally award them, unless when the appeal is on frivolous pretences, or for reasons which the appellant knew, or ought to have known to be unfounded, the power to award costs being discretionary.³

6. *In the Court of Common Pleas, and in appeals therefrom.* It has already been stated, that justices of the peace have original jurisdiction in all personal actions, where the debt demanded does not exceed

¹ Stat. 1783. *ch.* 42. *s.* 6.

² Vide Stat. 1817. *ch.* 190. *s.* 44.

³ *Osgood v. Breed*, 12 Mass. Rep. 525.

twenty dollars, and it is provided by *Stat.* 1786. *ch.* 52. *s.* 3. and by *Stat.* 1807. *ch.* 123. *s.* 2. that if upon any action originally brought in the Court of Common Pleas, where the title to real estate is not brought in question, judgment shall be recovered for no more than *twenty dollars* debt, or damage, in all such cases, the plaintiff shall be entitled for his costs, to no more than *one quarter part* of the debt, or damage so recovered.

When, however, an action, in which the title to real estate comes in question, is originally commenced before the Common Pleas, the plaintiff is entitled to full costs, although he recover less than twenty dollars, — as in an action of covenant broken, in which a breach is assigned, that the defendant was not seized, or had no right to convey the land,¹ — or, in an action for the obstruction of a way,² — or in an action of trespass, *quare clausum fregit*, where the defence is grounded on a title to the land,³ — and this, upon the principle that the *Stat.* 1783. *ch.* 42. *s.* 1. gives jurisdiction to justices, to try cases only, where “the title to real estate is not in question,” and because the *Stat.* 1786. *ch.* 52. *s.* 3. limits the costs to one fourth part of the damages recovered, only in those cases, where the title to real estate does not come in question.⁴ Whether in an action, where the title to real estate may, but does not actually, come in question, the plaintiff would be entitled to full costs, does not appear to have been directly considered and decided, though the weight of

¹ *Bickford v. Page*, 2 Mass. Rep. 445.

² *Crocker v. Black*, 16 Mass. Rep. 448.

³ *Butterfield v. Pearson*, 10 Mass. Rep. 410. *Dummer v. Foster*, 7 Mass. Rep. 476.

⁴ *Bickford v. Page*, 2 Mass. Rep. 462, note. *Padelford v. Padelford*, 7 Pick. Rep. 152. *Plympton v. Baker*, 10 Pick. Rep. 473.

authority is in favor of this construction of the statutes above cited.¹

On appeals. By *Stat. 1820. ch. 79. s. 4.* it is provided that any party aggrieved at the judgment of the Court of Common Pleas, in any real action, or in any personal action, wherein any issue has been joined, in which the debt, or damages demanded, shall exceed *one hundred dollars*, may appeal therefrom to the Supreme Judicial Court. And by the same section, where any appeal shall be made by any plaintiff, in any personal action, and he shall not recover more than *one hundred dollars* at the court appealed to, the plaintiff shall not recover any costs in that court upon such appeal; *provided*, however, that if the Supreme Judicial Court shall certify that there was a reasonable cause for appeal, he may recover his costs upon the same; and in case such appeal was made by the defendant, and the debt or damage is not reduced on the appeal, the plaintiff shall be entitled to *double costs* on the appeal, and have his judgment and execution accordingly.

In case the party appealing shall fail to enter the same, the appellee may, on complaint thereof in writing to the court appealed to, have the former judgment affirmed with costs.

By *Stat. 1822. ch. 105.* when a defendant appeals from any judgment of the Court of Common Pleas, in any personal action, in which the debt, or damage recovered, is less than *one hundred dollars*, and the same is not reduced on the appeal, he shall be liable to double costs.²

¹ Vide *Padelford v. Padelford*, 7 Pick. Rep. 152.

² Vide ante page 303.

There is a proviso in this statute, that nothing contained therein, or in the statute of 1820. *ch.* 79. to which it is an addition, shall affect the right of either party to recover costs according to the event of the suit in the court appealed to, in any personal action where the sum demanded shall exceed *one hundred dollars*, when the judgment appealed from shall be rendered on an issue in law, in which leave is reserved to plead anew in the court above, by one party, and assented to by the other party on record.

Under this proviso, many cases where the *ad damnum* exceeded *one hundred dollars*, were carried to the Supreme Court, upon sham demurrers, and the demurrer and plea being waived there, issues of fact were tried, and the plaintiff recovered his costs, though the sum recovered, was less than *one hundred dollars*.

By *Stat.* 1832. *ch.* 165. this proviso is repealed. The costs in such cases, therefore are governed by the general provision in the *Stat.* 1820. *ch.* 79. *s.* 4. and *Stat.* 1822. *ch.* 105. So that in personal actions, if the plaintiff recover less than *one hundred dollars*, in the court appealed to, whether the appeal be upon an issue in law, or of fact, the defendant will recover his costs.

Where in the court below, the plaintiff recovers less than *one hundred dollars*, and appeals, although he succeeds in establishing a demand to some amount, yet if that sum be less than *one hundred dollars*, the defendant is liable to no costs arising after the appeal; but he is entitled to recover his costs, arising in the action after the appeal, against the plaintiff.

On the other hand, if in the same case the defendant appeal, and the plaintiff prevail, though he recover

a less sum than *one hundred dollars*, the defendant is made liable to double the amount of legal costs, arising after the appeal.¹

If a plaintiff appeal from a judgment of the Court of Common Pleas, and on the appeal, his damages be reduced below *one hundred dollars*, in consequence of a demand, filed by the defendant, by way of set-off, the plaintiff will be entitled to costs to, and the defendant to costs after, the appeal.² But where the plaintiff in his writ demands and recovers more than *one hundred dollars*, in the Court of Common Pleas, and the defendant appeals, and on the appeal, the plaintiff's damages are reduced *below* one hundred dollars, the defendant will be liable to costs, as in ordinary cases of appeals, as the losing party.³

If a plaintiff, in a personal action, having appealed from a judgment against him in the Court of Common Pleas, recover less than *twenty dollars*, in the court appealed to, he will be entitled to recover only one fourth part as much costs as damages, notwithstanding the judge certify that there was a reasonable cause for appeal.⁴

So if the plaintiff recover less than *twenty dollars* upon an appeal made by the defendant, in an action originally commenced before the Court of Common

¹ *Lakeman v. Morse*, 9 Mass. Rep. 126. This case arose upon a construction of the Stat. 1817, ch. 185. Limiting the final jurisdiction of the Court of Common Pleas, to cases where the demand of the plaintiff did not exceed *fifty dollars*, but the same construction would be given to the present statute, enlarging the final jurisdiction of that court to demands, not exceeding *one hundred dollars*.

² *Gilman v. Burgess*, 12 Mass. Rep. 206.

³ *Ham v. Ricker*, 9 Mass. Rep. 28.

⁴ *Godfrey v. Godfrey*, 1 Pick. Rep. 236.

Pleas, the plaintiff will be entitled to only one fourth part as much costs, as damages.¹

If the plaintiff, in an action of *waste*, originally commenced in the Court of Common Pleas, recover damages, though less than *twenty dollars*, he will be entitled to full costs, it being an action which might put in issue the title to real estate, and therefore a real action within the meaning of the *Stat. 1820. ch. 79. s. 4.*²

If the plaintiff, upon a trial in the Court of Common Pleas, in any personal action, offer no evidence in support of his action, when he might have been prepared, or without moving for a continuance, when he is not in fault for being unprepared, suffer a verdict against himself, an appeal by him to the Supreme Court will be considered as made without reasonable cause, within the *Stat. 1820. ch. 79. s. 4.* and if he do not on the appeal, recover more than *one hundred dollars*, he will not be entitled to any costs, on the appeal, but the defendant will recover his costs against the plaintiff on such appeal.³

Where the plaintiff appealed from a judgment of the Court of Common Pleas, rendered upon a fictitious demurrer, and obtained a verdict upon the appeal for less than *one hundred dollars*; and the action being continued for advisement upon a question of law raised by the defendant, judgment was afterwards rendered in favor of the plaintiff, for the sum found by the verdict, with interest, which together amounted to more than one hundred dollars: it was held that, by virtue

¹ *Leland v. Bussey*, 7 Pick. Rep. 13.

² *Padelford v. Padelford*, 7 Pick. Rep. 152. *Plympton v. Baker*, 10 Pick. Rep. 473. Vide ante page 311.

³ *Chace v. Tucker*, 2 Pick. Rep. 27.

of the *Stat.* 1820. *ch.* 79. the plaintiff was entitled to recover his costs in the court below, and the defendant his costs on appeal.¹

In all the cases before referred to, where the party appealing recovers an amount insufficient to carry the costs on the appeal, he taxes his costs to the time of the appeal, and the other party taxes his costs upon and after the appeal only.

7. *In cases of set-off.* If a plaintiff commence an action in the Court of Common Pleas, on a demand exceeding *twenty dollars*, and the defendant file his demand, pursuant to the statute, by way of set-off, by which the plaintiff's damages are reduced below *twenty dollars*, he will nevertheless be entitled to full costs; but if the set-off be equal, or if it be found larger than the plaintiff's demand, so that judgment be for the defendant, he will be entitled to his costs.²

Where there is evidence, that a part, or the whole of the items of the account filed in set-off, was paid, or delivered *in satisfaction* of the plaintiff's demand, to an amount sufficient of itself, to reduce the plaintiff's demand to less than *twenty dollars*, he will be entitled for costs to no more than one quarter of the amount of damages so reduced, their being filed in set-off, not precluding the defendant from showing, that the items charged, were delivered in satisfaction of the plaintiff's demand.³

8. *In partition.* The *Stat.* 1786. *ch.* 53. provides for the mode of trying controverted facts in a petition for partition, so that an issue of law, or fact shall be pre-

¹ *Andrews & ux. v. Austin et al.* 2 Pick. Rep. 528.

² *Barnard v. Curtis*, 8 Mass. Rep. 535. *Gilman v. Burgess*, 12 Mass. Rep. 206.

³ *Ibid.*

sented for decision, and it is only in such cases, that costs are allowed in partition under the statute.¹

If upon the trial, the issue be in favor of the petitioner, judgment shall be entered that partition be made, and that the petitioner recover his costs, in form prescribed by law in other cases. But if, upon the issue, it be determined, that the petitioner hold less than alleged in his petition, the adverse party shall recover his reasonable costs.²

Upon a case stated for the opinion of the court, it was holden that neither party was entitled to costs, unless it was made an express part of the agreement, that costs should be allowed.³

9. *In flowing lands.* By *Stat.* 1795. *ch.* 74. *s.* 3. the party prevailing under this statute, in any complaint against mill-owners, for flowing lands, shall recover his full legal costs, though the damages assessed shall not amount to the sum of *four pounds*.

By *Stat.* 1797. *ch.* 63. *s.* 4. prescribing the mode of trying the title of the complainants to the land flowed, or to his right of damages therefor, provides that if the complainant shall fail to prosecute his complaint in any stage of the proceedings, or if the issue joined shall be determined against him, the respondent shall recover his costs as in other cases.

By *Stat.* 1799. *ch.* 78. it is provided that the owner or occupant of any mill-dam, may tender to the owner or occupant of such lands, as may be flowed by the erection of such mill-dam, any sum of money instead

¹ *Symonds v. Kimball*, 3 Mass. Rep. 299. *Swett et al. v. Bussey et al.* 7 Mass. Rep. 503.

² *Stat.* 1786. *ch.* 53. *s.* 1.

³ *Reed et al. v. Reed*, 9 Mass. Rep. 372.

of yearly damages, he may be entitled to receive from the owner, or occupant of such mill-dam, by virtue of *Stat. 1795. ch. 74.* within one month, after the past year's damages shall become due. And if the owner or occupant shall not accept the same, but shall present a new complaint to obtain an increase of damages, he shall not be entitled to costs thereon, unless he shall obtain an increase of the sum tendered.

And by the second section of the same statute, the owner or occupant of lands so flowed, may offer to the owner or occupant of such mill-dam, to receive of him any proportion of the sum established as his yearly damages, by reason of his said flowing, within one month after the past year's damages shall have become due. And if he shall refuse to receive the same, but shall present a complaint to obtain a decrease of said damages, he shall not be entitled to costs, thereon, unless he shall obtain a sum to be by him paid as damages, less than the sum, which the owner or occupant offered to receive of him; and no complaint shall be presented for an increase or decrease of said yearly damages, until after the expiration of one month after the same shall become due.

10. *On writs of review.* In reviews of actions, in which debt, damage, or land is demanded, when the plaintiff, upon the original trial, has recovered less than his first demand, by an erroneous verdict, if he review the cause, and have the error corrected, by an increase of his damages, he is entitled to the costs of his review; if, however, upon his writ of review, the plaintiff, fail in recovering his whole demand, or recover less upon the second trial, than in the original suit, the party

in whose favor the error is corrected, is the prevailing party, and entitled to his costs.¹

In replevin, however, a verdict being found for the defendant, and damages assessed in his favor, the plaintiff reviews the action and obtains a reduction of the damages, the defendant, notwithstanding, is entitled to his costs, because the defendant could have recovered no damages, unless the plaintiff had wholly failed in his action.²

When on a review by the defendant, the former judgment is reversed in part as to damages, the costs of the original action are not affected, but the defendant is entitled to the costs of the review.³

Costs are not allowed to a plaintiff in review, whose object is to obtain an increase of damages, when the mistake arose from the carelessness of his attorney, although the defendant refused to correct it, when he had notice of it.⁴

Where a plaintiff, reviewing his action, becomes nonsuit, because no review lay in the case, the defendant is entitled to his costs.⁵

So it would seem, that if a defendant obtain a review, and become defaulted, the plaintiff would be entitled to his costs, as the party prevailing.

But upon a petition for a review, which upon hearing is refused, no costs are allowed, the statutes of reviews not giving any in such cases.⁶

11. *On writs of error.* At common law, there were no costs allowed on writ of error.

¹ *Bruce v. Learned*, 4 Mass. Rep. 614.

² *Ibid.*

³ *Billerica v. Carlisle*, 2 Mass. Rep. 158.

⁴ *Isley v. Knight*, 1 Mass. Rep. 467.

⁵ *Treat v. Hathaway et al.* 7 Mass. Rep. 503.

⁶ *Vide Symonds v. Kimball*, 3 Mass. Rep. 299.

The first mention of *costs in error*, is in the 3d Hen. VII. c. 10. where it was enacted that “if any defendant, or tenant, or any other, bound by any judgment, before execution sue any writ of error to reverse such judgment in delay of execution: that then, *if the same judgment be affirmed*, or the writ of error *discontinued*, or the party suing error be nonsuited, the person against whom it is sued, shall recover his *costs and damages*, for his delay and wrongful vexation, by the discretion of the justices before whom the said writ of error is sued.”¹

If a judgment be affirmed on a writ of error, the defendant in error will be entitled to costs, but they are never allowed, where the writ is quashed, as having issued improvidently.²

If the judgment be affirmed on error, costs are recoverable, notwithstanding they were not recoverable in the original action.³

Costs are not allowed on a writ of error, where the judgment is reversed for error in law.⁴

In *Brown v. Chase*,⁵ where a judgment of the Court of Common Pleas was reversed on writ of error, the plaintiff in error moved for costs. Parsons Ch. J. observed, that “the practice having been uniform not to grant them, where the judgment is reversed for error in law, it cannot be shaken without great consideration,” and the motion was denied.

¹ 2 Sellon. Pract. 444.

² *Jarvis v. Blanchard*, 6 Mass. Rep. 4.

³ *Ferguson v. Rawlinson*, 2 Strange, 1084.

⁴ *Howe v. Gregory*, 1 Mass. Rep. 81. *Berry v. Ripley*, 1 Mass. Rep. 167. *Durrell v. Merrill*, 1 Mass. Rep. 411. *Mountfort v. Hall*, 1 Mass. Rep. 443. *Smith v. Franklin et al.* 1 Mass. Rep. 480. *Nelson v. Andrews*, 2 Mass. Rep. 164.

⁵ 4 Mass. Rep. 436.

But costs are allowed, on a writ of error, where the judgment is reversed for error in fact,¹ where the defendant in error has been in some fault, but not otherwise.²

In the case of *Hewes v. Benson*,³ where the error assigned was, that at the time of service of the original writ, and until after the time of the trial thereof, the plaintiff in error, was not within the Commonwealth, and was not notified of the pendency of the suit, and the fact was not suggested on the record, nor any continuance had, — the court reversed the judgment, with costs to the plaintiff in error.

12. *On reports of referees.* Where judgment is rendered upon any report of referees appointed in pursuance of the *Stat. 1786. ch. 21. s. 1.* or by appointment of any court of record, under a general rule of court, full costs are taxed by the party prevailing, although the judgment be less than *four pounds*, unless a different adjudication respecting costs, shall be made from the report itself, or a different agreement is made by the parties to the rule of reference.⁴

Where the referees are appointed by virtue of the *Stat. 1786. ch. 21. s. 1.* or by rule of court, in the common form, they have full power to award concerning costs,⁵ for though the statute gives the referees no authority upon the subject, yet it clearly supposes such an authority to exist.⁶

¹ *Blanchard v. Wild*, 1 Mass. Rep. 342.

² *Knapp v. Crosby*, 1 Mass. Rep. 479.

³ S. J. C. Suffolk, March T. 1808. Mass.

⁴ Stat. 1786. ch. 52. s. 3.

⁵ *Nelson v. Andrews*, 2 Mass. Rep. 164.

⁶ Ibid.

But under a submission, by bond at common law, of all demands between the parties, it would seem that the arbitrators have no power to award concerning the costs, unless authorized by the submission,¹ they not being included within the terms of submission.²

The fees of the referees, if taxed in their report, become a part of the costs of suit, to be recovered by the prevailing party, unless otherwise directed by the report; it is usual for the referees, however, to state in their report, by which party they shall be paid.

13. *Upon complaint where a writ has been served and returned, but the action is not entered.* Where a suit has been commenced by the service of a writ, but the plaintiff fails to enter the action, the defendant may file his complaint in writing, in the court, at the term to which the writ is returnable, setting forth the fact, and thereupon he will be entitled to a judgment for his costs.³

If the officer have not returned the writ into court, the complainant on motion may have a rule upon him, to shew cause why it has not been returned.

14. *In certiorari.* Costs will not be allowed, to the respondent, on the refusal of the court to grant a certiorari.⁴

Nor upon a rule to shew cause why an information in the nature of a *quo warranto* should not be granted.⁵

¹ *Peters v. Pierce*, 8 Mass. Rep. 398.

² *Cutter v. Whittemore*, 10 Mass. Rep. 442. Vide *Candler v. Fuller*, Willes. Rep. 62. *Whitehead et al. v. Firth*, 12 East. Rep. 165. *Wood v. Doe*, 2 Term. Rep. 644.

³ *Gilbreth v. Brown et al.* 15 Mass. Rep. 179. per Wilde J.

⁴ *Exparte Cushman*, 4 Mass. Rep. 565.

⁵ *Commonwealth v. Athearn*, 3 Mass. Rep. 285.

15. *On petitions and motions.* Costs are not generally allowed upon any matter coming before the court upon petition or motion, unless provided for by statute.

In the case of petitions for sale of real estate, to the Supreme Judicial Court, when it appears that the petition is unreasonable, the justices of the court may award reasonable costs to such respondent as shall appear and object thereto.¹

16. *On laying out ways.* By *Stat. 1786. ch. 67. s. 4.* it is provided, that if any person, whose property be taken, or damaged by the laying out of the highway, find himself aggrieved by the committee locating the way, or in the estimation of his damages, he may apply to the court for a jury; which being had, if they do not alter the way, or increase the damages, the person complaining shall be at all the costs incurred, to be taxed against him by the court; — but if the jury shall alter the way, or increase the damages, the costs shall be paid by the county, and the damages by the county or district, &c.

By *Stat. 1818. ch. 121. s. 2.* the party, whose complaint shall have been without just cause, as to locating a new highway, or common road, or in estimating damages, shall be at all the costs incurred thereby.

No costs are allowed, against any party, who rests satisfied with the report of the committee.²

So where a corporation being dissatisfied with the report of the committee, obtain a jury, who return a less amount of damages, no costs are allowed to the owner of the land against the corporation.³

¹ Stat. 1783. ch. 32. s. 6.

² *Commonwealth v. Carpenter*, 3 Mass. Rep. 268.

³ *Ibid.*

By the special laws,¹ regulating the paving of streets, &c. in the town of Boston, it is provided that the selectmen may lay out and widen any street, and the compensation by way of damages, to the owners of lands under or adjoining, is to be determined in the way and manner pointed out by *Stat. 1786. ch. 67.* before cited.

By *Stat. 1821. ch. 109.* the Court of Common Pleas for the county of Suffolk, are empowered to exercise the powers of the Court of Sessions, with regard to streets and ways, and the trial is to be had at the bar of the court, in the same manner as other civil actions are there tried.

Under these provisions, costs have been given, as in other civil actions, tried in Suffolk.

17. *In chancery.* The allowance of costs in suits in equity, and the mode of allowance are entirely within the discretion of the court, and they are authorized to allow costs to either party, as equity may require.²

The general rule, however, is that the prevailing party in equity is entitled to costs, and the other party is bound to shew the existence of circumstances, which shall take the case out of the general rule.³

Where the plaintiff in equity has good reason to believe that he had sufficient cause for bringing his suit, but upon the defendant's answer, it appears that such cause did not exist, the plaintiff will not generally be held to pay costs. But if the plaintiff know all the facts,

¹ 2 Special Laws, 339. 3 Special Laws, 506. 5 Special Laws, 171.

² *Battle v. Griffin*, 5 Pick. Rep. 167. *Saunders et al. v. Frost*, 5 Pick. Rep. 271.

³ *Ibid.* *Clark et al. v. Reed et al.* 11 Pick. Rep. 446.

and make a claim in equity which is successfully resisted, he will be adjudged to pay costs.¹

SECT. III. TAXATION OF COSTS.

Manner of taxing costs. Bills of costs shall be taxed by the clerk, upon a bill to be made out by the party entitled to them, if he shall present such bill, and if he do not, then the clerk shall do it, upon a view of the proceedings and files of the court, appearing in the clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the clerk in writing, or by causing it to be entered on the clerk's docket, of his desire to be present, at the taxation thereof. And either party, dissatisfied with the taxation by the clerk, may appeal to the court, if it be in term time, or to one of the judges thereof in vacation.²

In practice, the clerk never taxes the costs, but the party entitled to them makes them up, and the clerk approves the taxation, if correct; the party enters the taxation upon the back of the writ, or which is more proper — makes it up on a separate piece of paper, which is handed to the clerk and filed with the papers in the case.

The bill, to be made out and handed to the clerk, should be entitled of the court and term, in which the judgment is rendered, as will be shewn hereafter, the

¹ Ibid. *Clark et al. v. Reed et al.* 11 Pick. Rep. 446.

² Reg. Gen. S. J. C. 40. Appendix A. *Dodd v. Lewis*, 10 Mass. Rep. 26. *Winslow v. Hathaway et al.* 1 Pick. Rep. 211.

names of the parties and the number of the action should then follow, and then the different items of the bill in the order in which they will be treated. The damages should be set forth, at the foot of the bill on the left hand of the taxation, and the whole should be signed by the person taxing the costs.¹

Writ. The plaintiff is allowed in the bill, for a writ returnable before a justice, *fifty-seven cents*.² In the Court of Common Pleas, where no issue is joined, of fact or law, or where one is joined, but the writ is not read, or the case is not submitted to the jury, the writ is *two dollars and fifteen cents*,³ where an issue in fact, or law is joined, *fifty cents* more is allowed in the taxation of the writ.

In the Supreme Judicial Court, the attorney is allowed, for the writ, in all causes, where an issue of fact or law is joined *two dollars and fifty cents*, and in all other causes, *one dollar and twenty-five cents*.⁴

Service. The amount of the officer's fee, for the *service* of a writ, depends upon the kind of service,

¹ Vide form of the bill, supra note A. at the end of this chapter.

² The following compose the items which make up this amount, viz:

<i>Declaration,</i>	,40
<i>Blank,</i>	,17
	—0,57

³ <i>Attorney,</i>	\$1,50
<i>Power,</i>	,50
<i>Blank,</i>	,15
	—2,15

⁴ The practice in the county of Suffolk is, in all civil actions, to charge *two dollars and fifty cents*, but this is wrong, it should be either *two dollars and ninety cents*; that is—*two dollars and fifty cents*, allowed by statute to the attorney, where an issue of law or fact is joined, and *forty cents*, in common cases, for the blank, which the attorney must pay the clerk,—or it should be *one dollar and twenty-five cents*, where no issue is joined, together with the costs of the blank, which, as before stated, is in common cases *forty cents*.

and the number of miles, which the officer travels, or is supposed to travel, from the place of service, to the court to which the writ is returnable. The officer's return generally gives the amount, which under the head of *service*, the party charges in his taxation of costs; but this is not always so, for no more will be allowed than his legal fees, although he may have charged more, unless, in the case of removing or keeping property attached, where he has been put to extraordinary trouble and expense, he return with his precept, a bill of particulars of his expenses, together with his affidavit, that such expenses were actually incurred, and that the charges are reasonable.

Entry. In actions, returnable before a justice of the peace, the *entry* of a writ is *sixty-one cents*. In the Court of Common Pleas, in common cases, *one dollar and ninety-three cents*;— in cases of trustee process, *two dollars and seventy-three cents*;— in the Supreme Judicial Court, in common cases, *three dollars and seventy-five cents*;— in cases of trustee process, probate appeals, and bills in equity, *four dollars and fifty cents*.¹

¹ In the Court of Common Pleas, the following items compose the entry fee, viz:—

Justices' fee for entry, including taxation of costs,	-	-	,80
Clerk's fees for entry, including taxation of costs and filing papers,	-	-	,50
Confession of judgment, or default,	-	-	,10
Entering up judgment and recording,	-	-	,20
Sheriff's fees on default,	-	-	,08
Crier's fees,	-	-	,15
Additional ten cents, for entering appearance, (<i>casus omisus</i> , in the statute,) but provided for in the provincial law of 4th Wm. and Mary, ch. 17. not repealed.	-	-	,10
			—\$1,93

Entry of complaints, for affirmation of judgment, is the same as for a common entry of an action in the Court of Common Pleas, viz: *one dollar and ninety-three cents*. In the Supreme Court, the entry in such case, is *two dollars and fifty cents*.¹

Travel. For every *ten miles*, that a prevailing party actually travels, in going to, and returning from court, he is allowed *thirty-three cents*, but unless he actually do travel to the court to attend the trial, or employ some agent, or attorney, who in fact travels more than *forty miles* specially to attend the court in the case, he will only be allowed, for forty miles' travel going, and the same returning, if he reside more than that distance from the court. Where the party employs an agent or attorney, who travels more than forty miles, specially to attend to the case, in order to have it allowed, he must file his certificate of the

The following items compose the entry fee in the Supreme Court, viz :

<i>Justices' fees including taxation of costs,</i>	- - -	1,20
<i>Clerk's fees for entering each case for trial</i>	- -	,70
do. do. receiving and recording verdict,	- -	,40
do. do. entering up judgment and recording,		,60
do. do. entering an appearance,	- - -	,10
do. do. taxing costs and filing papers exclusive of execution,	- - - - -	,40
<i>Sheriff's fees on every trial,</i>	- - - - -	,15
<i>Crier's fees,</i>	- - - - -	,15
		—\$3,70

There is actually received, however, as before stated, \$3,75.

¹ The entry in this case is made up as follows, viz :—

<i>Justices' fees,</i>	- - - - -	\$1,20
<i>Clerk's fee on entry,</i>	- - - - -	,35
do. do. entering up judgment and recording,		,30
do. do. taxing costs and filing papers, exclusive of execution,	- - - - -	,40
do. do. entering appearance,	- - - - -	,10
<i>Crier's fee,</i>	- - - - -	,15
		—\$2,50

fact, verified by his affidavit, and filed with the bill of costs.¹

Attendance. By *Stat. 1795. ch. 41.* it is provided that for parties recovering costs “whether in the Supreme Judicial Court, Court of Common Pleas, General Sessions of the Peace, (now commissioners of highways,) or before a justice, *thirty-three cents* is allowed for each day’s attendance and travel, ten miles to be accounted as one day.” And no plaintiff shall be allowed for more than three days’ attendance, at the term, when the defendant is defaulted, unless the defendant appear and make answer to the plaintiff’s suit; in which case, if the defendant be defaulted, after the expiration of three days, no attendance shall be taxed for the plaintiff, after the day, when the default shall happen.

This is not conformable to the practice in the Court of Common Pleas; in this court, where there has been an appearance, and afterwards a default or verdict is had, attendance is allowed until the judgment upon the default, or verdict, is rendered, which is usually done, on the last day of the term; but in the Supreme Court, the practice more nearly conforms to the letter of the statute, and costs for attendance are only allowed to the day of default or verdict, unless the case is continued upon motion of the party, against whom the default or verdict is had.

By the rule of the Supreme Court,² it is directed, that when an action is continued for advisement, or under

¹ When the plaintiff resides in the town, or strictly speaking, within *five miles* of the court, to which the writ is returnable, he should not be allowed fees for travel, as to entitle himself to them, he should travel at least *ten miles*.

² Reg. Gen. S. J. C. 41. Appendix A. *Hayward v. Ritchie*, 7 Mass Rep. 286.

Continuance. The plaintiff pays *twenty cents* for every continuance of his action, whether made upon his motion, or otherwise, and it is allowed, if he prevail, in his bill of costs ; in trustee suits, *forty cents* are charged and allowed for every continuance.

By *Stat. 1805. ch. 63. s. 1.* the jury fees, to be paid in all civil actions, tried by jury, in the Supreme Court, Court of Common Pleas, and Municipal Court, by the plaintiff, or appellant, are fixed at *seven dollars*. To this sum the clerks of the various courts have added various small items, some of them allowed by statute, varying the amount of jury fees actually paid, from *seven to nine dollars*.¹

¹ In the Court of Common Pleas, for the county of Suffolk, *nine dollars* are paid, under the name of jury fees, and that sum is made up as follows, viz :—

[illegible]

jury fees are not allowed, and will be paid back to the plaintiff, but the clerk retains *one dollar*.

In the Supreme Court, the jury fees are *eight dollars*.¹

Attorney's fee. This is a separate item in the bill of costs, and is allowed in those cases only, in the Court of Common Pleas, where an issue in law or fact has been joined, and the writ has been read, or has been submitted to a jury.² For the plaintiff, the attorney's fee is *one dollar and fifty cents*; but where the defendant is the prevailing party, he is, in practice, allowed in the county of Suffolk, *two dollars*.

In the Supreme Court, in all cases where an issue in law, or fact is joined, whether the writ be read or submitted to the jury or not, the *attorney's fee* is *two dollars and fifty cents*, and as almost every case, which comes to this court, is by appeal, where an issue must be joined, there can rarely be an exception to the rule established in the practice of the county of Suffolk, to charge *two dollars and fifty cents*, indiscriminately, in all cases.

Witnesses. Witnesses are entitled, before they can be compelled to appear and testify in an action, to their fees, viz: *one dollar* for a day's attendance, before the Court of Common Pleas, and Supreme Court, and *thirty-three cents* before a justice, and *four cents* for every mile's travel, going and returning to the court,³ to be paid by the party summoning him,

¹ Jury fees given by Stat. 1805. ch. 63.	-	-	-	\$7,00
Crier calling the jury,	-	-	-	,08
Officer attending the jury,	-	-	-	,25
Swearing witnesses, &c.	-	-	-	,67
				—\$8,09

² Stat. 1813. ch. 11.

³ Stat. 1795. ch. 41. Stat. 1805. ch. 63. Stat. 1817. ch. 88.

who, if he prevail, will be entitled to recover the fees so paid, of the other party. If the witnesses are to be kept in attendance, they must be paid *one dollar* in advance of every day they attend, which, of course, forms a part of the bill.

In addition to the charge of travel and attendance, the sum of *ten cents* is allowed for the *subpœna* or summons, and also, for the service of the same by the officer, the sum he shall charge for the service, provided it be reasonable, there being no specified fee for such service.

The name of each witness should be entered on the bill, and the number of miles, he travelled, and the number of days, he attended in the case : and the bill should likewise be accompanied by the *subpœna*, or summons, and the certificate of each witness, stating the number of miles he travelled, and the number of days he attended the court, as a witness in the case.

Costs may, however, be taxed, for a witness, who has attended and testified in an action, at the request of a party, without being subpœnaed,¹ even though he may not have been examined, provided he certify that he attended as a witness, upon the request of the prevailing party.² Much depends upon the integrity and fairness of counsel, in directing the attendance of witnesses, and where there is no doubt or suspicion of unfairness, there seems to be no reason why the witness' fees should not be taxed, because through the concessions of the other party, or from any unforeseen turn of the cause, their testimony may not be required.³

¹ *Farmer v. Storer*, 11 Pick. Rep. 241.

² *Ibid.*

³ *Ibid.*

The certificate of a witness, as to his travel and attendance, when there are no suspicious circumstances attending it, is conclusive upon the court, as well as the clerk, in the taxation of costs; but otherwise, where the court are led to suspect the truth or fairness of the certificate, it will interfere and correct the taxation of the clerk,¹ or require an affidavit at least, in support of its correctness.²

Depositions, copies of papers, &c. The deponent's, and justices' fees for taking a deposition, should be certified by the justice, in the deposition, and they are usually allowed in the bill of costs.

Such sum will be allowed for the expense of taking a deposition in a foreign country, as in the discretion of the court shall seem reasonable: thus where the expense of taking some depositions in a foreign country, under a commission from the court here, were *fourteen hundred and thirty-one dollars*, the court allowed the plaintiff, at whose expense they were taken, to tax for them in his bill of costs, *four hundred dollars*.³

Where copies of deeds are used in the trial of an action, the expense of such copies will be allowed in the taxation of costs, at the rate of *fourteen cents* for every page.⁴

Recording, &c. The last item in the bill, when the judgment is final, in the Court of Common Pleas, is that of *recording, &c.* for which the clerk has *fifty cents*. If the case be carried to the Supreme Court, by appeal, or exceptions, the same sum is charged for

¹ *Cook v. Holmes*, 1 Mass. Rep. 295.

² *Farmer v. Storer*, 11 Pick. Rep. 241.

³ *Thorndike v. Borden*, 6 Pick. Rep. 375.

⁴ *Inhabitants of Suffolk v. Mill Pond Wharf Co.* 5 Pick. Rep. 540.

recording and certifying the taxation of the costs in the court below.

In the Supreme Court, the last item in the bill of costs, is for recording, *twelve cents* per page, according to the length of the record.

Fee on demurrer. Before, however, the above item in the bill, when the case is carried to the Supreme Court, upon an issue in law, the clerk is entitled to a *fee on demurrer*, of *two dollars and forty-five cents*, in common cases, and in trustee actions, of *three dollars and fifteen cents*; which is paid by the party appealing, and taxed by him, if he prevail; there is likewise in all cases of appeals, demurrer, and exceptions, an item for the copies of the papers of the case, which are paid for by the party appealing or excepting, and which are taxed by him, if he prevail.

Miscellaneous cases. Report of referees. Where an action is referred, there are besides the costs of reference, two additional items, in the bill of costs, the first, — *entering the rule of reference, fifty cents*,¹ the second, — *the acceptance of the report, one dollar and fifty-two cents*, though strictly, but *one dollar and twenty-two cents*, are allowable.²

On petitions for sale of real estate, in the Court of Common Pleas, the fees are paid on the entry of the petition; they amount to *two dollars and fifty*

¹ Viz : — Clerk's fee for entry of the rule,	-	-	-	,15
do. do. recording and copy,	-	-	-	,35
				—0,50
² Viz : — Justices' fee for accepting report,	-	-	-	,60
Clerk's fee for entering acceptance,	-	-	-	,12
do. do. recording,	-	-	-	,50
				—\$1,22

lowed, together with travel, attendance, witnesses' fees, and power of attorney, when costs are decreed by the court, as in common cases.

NOTE A.—*In the Court of Common Pleas. Form of the bill.* The following bill of costs is framed upon the supposition that the action has been continued one term, and tried by jury.

Suffolk, ss. Court of Common Pleas, Jan'y Term, A. D. 1834.
C. A. No. John Doe v. Richard Roe.

Plaintiff's costs.

1833, } Oct. T. }	<i>Writ,</i> - - - - -	\$2,15
	<i>Entry,</i> { (if a common writ,) 1,93 (if a trustee writ,) 2,73	
	<i>Service,</i> ¹	
	<i>Travel,</i> ²	
	<i>Attendance,</i> ³ fourteen days,	4,62
	<i>Continuance,</i> { (if a common writ,) 20 (if a trustee writ,) 40	
		—\$
1834, } Jan. T. }	<i>Travel,</i>	
	<i>Attendance,</i> ten days,	3,30
	<i>Jury fees,</i> - - - - -	9,00
	<i>Attorney's fee,</i> - - - - -	1,50
	<i>Depositions,</i> ⁴ viz:	
	<i>A. B.'s</i> - - - - -	4,50
	<i>C. D.'s</i> - - - - -	5,20
	<i>Witnesses,</i> viz:	
	<i>E. F.'s</i> - - - - -	4,16
	<i>G. H.</i> - - - - -	1,04
	<i>Subpœna,</i> - - - - -	,10
	<i>Service of do.</i>	
	<i>Copies of papers,</i> ⁶	
	<i>Recording, &c.</i> - - - - -	,50
		—\$
Pl'ffs Damages. ⁷		
<i>Verdict,</i>	\$	
<i>Int. (if any,)</i>		
	A. B.	Pl'ffs Att'y.

¹ This depends upon the nature of it, as by the officer's return on the writ.

² Vide ante page 328, and 329, note 1.

³ In continued actions, attendance is allowed for every day of the term.

⁴ The fees of deponents, magistrates, &c. as set forth in the deposition.

⁵ This supposes E. F. to have attended *four days*, and travelled *four miles*, as must appear by his certificate, filed with the bill.

⁶ The papers, of which copies are filed, should be succinctly stated.

⁷ If a *verdict*, the amount, with interest, if the case had been continued, for advisement, upon motion, or otherwise, beyond the term at which the verdict was rendered,—if upon *default*, the damages are briefly stated, principal and interest, claimed, and added together.

The form of a bill of costs, in an action *defaulted at the first term*, must be entitled, as the preceding form, and then proceeds.

1834, } Jan. T. }	Plaintiff's costs.	
	<i>Writ,</i> - - - -	2,15
	<i>Entry,</i> { (if a common writ,) 1,93 (if a trustee writ,) 2,73	
	<i>Service,</i> ¹	
	<i>Travel,</i> ¹	
	<i>Attendance, three days,</i> ²	,99
	<i>Recording, &c.</i> - -	,50
Pl'ffs Damages.		—\$
<i>Note or Acc't.</i> \$		
<i>Interest from</i>		
<i>to</i>	A. B.	

Pl'ffs Att'y.

The following bill of costs taxed by the *defendant*, supposes, as in the former case, that the action has been continued, and should be entitled in the same manner, as in the plaintiff's bill. It then proceeds:

Defendant's costs.³

1833, } Oct. T. }	<i>Travel,</i>	
	<i>Attendance,</i>	
1834, } Jan. T. }	<i>Travel,</i>	—\$
	<i>Attendance,</i>	
	<i>Attorney's fee,</i> ⁴	
	<i>Depositions, viz. &c.</i>	
	<i>Witnesses fees, viz. &c.</i>	
	<i>Copies of papers, &c.</i>	
	<i>Taxing costs, &c.</i> ⁵	—\$
	A. B.	
	<i>Dfdt's Att'y.</i>	

¹ Vide these *two* items in preceding form.

² Vide ante page 329.

³ The plaintiff pays the fees of the clerk, as the cause proceeds; they do not therefore appear in the bill, unless he prevails, and the defendant taxes in his bill, only his own costs, including what he pays out, in legal fees, during the progress of the cause. We again repeat, that in the Court of Common Pleas, the prevailing party taxes attendance, wherever the defendant appears, during the whole of every term, until the final disposition of the cause, including the term at which it is disposed of, except when it is under reference, or continued by the court for advisement.

⁴ Attorney's fee for defendant is *two dollars*.

⁵ There being no fee allowed, where the defendant prevails, for recording, the clerk charges *fifty cents* for *taxing, &c.*

In the Supreme Court. Form of the bill. The bill, after having been entitled, of the court and term, at which judgment is rendered, sets forth the costs in the court below, which are certified by the clerk of that court, as follows:—

Suffolk, ss. Supreme Judicial Court, Nov. Term, A. D. 1833.

John Doe v. Richard Roe.

Plaintiff's costs.

Costs in the C. C. Pleas, viz:—

1833, } Oct. T. ¹	Writ, Entry, Service, Travel, Attendance, Attorney's fee, Jury fees, Depositions, viz. &c. } ² Witnesses, viz. &c. } Fee on demurrer, ³ Copies of the case, ⁴ Recording and certifying,	\$2,45 ,50 —\$
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Certified and approved.

C. A. P.

Clerk.

In the Supreme Court, viz:—

1833, } Nov. T. ¹	Entry, - - - Travel, } ⁵ Attendance, } Attorney's fee, - - - Jury fees, - - - Depositions, viz. &c. Witnesses fees, viz. &c. Copies of papers, viz. &c. Recording, &c. ⁶	\$3,75 2,50 8,00 —\$
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Damages.

\$

A. B.

Plff's Att'y.

¹ This bill supposes the action to have been entered at the October term, and not therefore continued in the court below; but if a continued action, the travel, attendance, and continuance for each successive term, are to be added, except when continued by the court, for advisement, or under reference.

² These are charged only in cases of appeal upon an issue of fact; if carried up by *demurrer*, they are omitted.

³ This is allowed only, when the appeal is from a judgment, upon an issue in law.

⁴ According to the charge of the clerk.

⁵ Travel and attendance are taxed in the same manner as in the court below, viz: to the day when judgment is rendered.

⁶ In the *Supreme Court*, the recording is taxed by the clerk, according to the length of the record.

The bill for the *defendant* is made out in the same manner, with this difference only, that he can only tax the costs, to which he is personally entitled, and those fees which he has been legally compelled to pay in the case, the plaintiff paying the usual taxable fees of clerk, sheriff, &c. in order to prosecute his action.

We have given the fees in those cases which most commonly arise in practice.

The practice in the different counties of the state, varies in many respects, and too much reliance is not to be placed upon the method of our computation. There is no blinder subject, to the young practitioner especially, in the course of his practice, than our fee-bill, and as the usage of the court, in several important respects, departs from the statute provisions upon this subject, the clerks of the courts have become the only repositories of knowledge upon this useful subject.

B O O K I I.

BOOK II.

CHAPTER I.

SET-OFF.

THE principle of *set-off*, was unknown at the common law. It was introduced into the English practice by *Stat. 4. Anne, c. 17.* and its application was subsequently enlarged by *Stat. 5. Geo. II. c. 20.*

The right of *set-off* in our practice, is derived from our statutes, in all cases, with the single exception of the practice in relation to cross-judgments.

SECT. I. SETTING OFF DEMANDS.

In what actions. The enumeration in the statutes of *set-off*, of the several actions in which demands in *set-off* may be filed, embraces only, — actions brought to recover *debts*, due on book account, — an *account stated* by the parties, — a *quantum meruit*, — *quantum valebat*, — for *services* done upon an *agreed price*,¹ and actions for *debt* upon simple contract, or promise in writing not under seal.²

From the phraseology of these statutes, some doubt might arise, whether actions of *assumpsit* to recover

¹ Stat. 1784. ch. 28. s. 12.

² Stat. 1793. ch. 75. s. 4.

uncertain damages, are included. The words in the *Stat. 1793. ch. 75.* are, any “action, brought for *any debt*, upon simple contract, or promise in writing not under seal.” A strict construction excludes all but debts, and the nature of the whole provision in both statutes, and of *set-off* in general, seems to confirm that construction. In actions for mere damages, therefore, as for misfeasance and non-feasance, and in actions on collateral promises, as of indemnity and guaranty, it may be doubted, whether *set-off* is allowable.

No *set-off* can be had in covenant, debt upon specialties, or records, — or in any action in form *ex delicto*.

What demands. By *Stat. 1784. ch. 28. s. 12.* “the defendant may file *any account he hath*,” and by *Stat. 1793. ch. 75. s. 4.* he may file his demands against the plaintiff, for “*goods delivered, monies paid, or services done.*”

The demands must be founded in contract; a claim, therefore, arising from the negligence of the plaintiff, as a factor in relation to merchandize consigned to him, cannot be *set-off*.¹

They must be due on simple contract, and not by specialty or record, and they must be for a certain sum, or a sum capable of being reduced to a certain charge, or account, and not for unliquidated damages.

Under the head of “*monies paid*,” the defendant may file an account for *monies had and received*,² and may give in evidence, promissory notes of the plaintiff payable to himself, or indorsed to him, before the action was commenced.³

¹ *Adams et al. v. Manning et al.* 17 Mass. Rep. 178.

² *Richards v. Blood*, 17 Mass. Rep. 66. *Truesdell v. Wallis*, 4 Pick. Rep. 63.

³ *Sargent et al. v. Southgate*, 5 Pick. Rep. 312. *Braynard v. Fisher*, 5 Pick. Rep. 355.

A demand for board, washing and lodging, is within the meaning of "goods delivered and services done," and may be filed in *set-off*.¹

The demands must generally be *between the same parties*. Thus, where there are two defendants, a demand in favor of one cannot be *set-off*; and so, where there are two plaintiffs, a demand against one cannot be *set-off*, nor a demand against the plaintiff and another person.²

But a debt due to, or from one as surviving partner, may be *set-off*, as if he were the sole contractor.³

And in an action brought in the names of an ostensible and a dormant partner, the defendant may *set-off* demands against the ostensible partner only.⁴

In an action by the indorsee against the maker of a note, indorsed after it became due, the defendant may give in evidence his demands against the payee, which accrued before the transfer, by filing the same in *set-off*,⁵ even though he may have commenced an action, and the action be pending.⁶

But he must file them in the manner pointed out by the statute, or they cannot be allowed,⁷ unless the plaintiff received the note fraudulently, for the purpose of preventing the defendant's *set-off*.⁸

¹ *Witter v. Witter*, 10 Mass. Rep. 223.

² *Walker v. Leighton et al.* 11 Mass. Rep. 140.

³ *Ibid.*

⁴ *Lloyd v. Archbowle*, 2 Taunt. Rep. 324. *Lord v. Baldwin*, 6 Pick. Rep. 348, 352.

⁵ *Sargent et al. v. Southgate*, 5 Pick. Rep. 312. *Peabody v. Peters et al.* 5 Pick. Rep. 1.

⁶ *Ibid.*

⁷ *Braynard v. Fisher*, 6 Pick. Rep. 355.

⁸ *Stockbridge v. Damon*, 5 Pick. Rep. 223.

One summoned as trustee, is to be allowed all his demands against the principal, of which he could avail himself in any form of action, or any mode of proceeding between him and his principal, excepting, of course, all claims for unliquidated damages for mere *torts*.¹

The demands must also be due *in the same right*. A debt due from an executor, or administrator, cannot be *set-off* against a claim due to the estate.

Cases where set-off will be allowed without filing the account. In actions on policies of insurance, the underwriters have a right to *set-off* against a loss, not only their premium arising on the same policy, but also premiums arising upon other policies, entered into between the same parties, unless the policies have been assigned, with the assent of the underwriter. This right arises from the lien, which the law gives the underwriters in such cases.²

In consequence of the several statutes in relation to the settlement of insolvent estates, providing for an equitable distribution of the assets among all the creditors, — where mutual demands exist between a deceased insolvent and another person, and the executor or administrator, sues such person at law, the latter has a right to plead his own demand by way of *set-off* without filing it, and the plaintiff can only recover the balance, if any thing should be due, upon a settlement of all their mutual claims and demands;³ and the right of such person to a *set-off* will not be lost, by

¹ *Hathaway v. Russell*, 16 Mass. Rep. 473.

² *Cleveland v. Clap et al.* 5 Mass. Rep. 201.

³ *McDonald v. Webster*, 2 Mass. Rep. 498. *Jarvis v. Rogers*, 15 Mass. Rep. 407.

his having neglected to present his claim to the commissioners.¹

But his claim can be used, only to meet the claim made against him, and he cannot recover any balance, if one should be found due to him.²

So if the creditor of an insolvent estate bring his action, in consequence of his claim being disallowed by the commissioners, the executor or administrator may plead any demand his insolvent had against the creditor, by way of *set-off*, and if the claim due the estate, exceed that of the creditor, he may recover the balance.³

It is hardly necessary to remark, that where goods have been delivered or money paid by the defendant, in satisfaction of the sum demanded in the action, the aid of the statute is not required, and the account need not be filed; it is equivalent to payment, and may be given in evidence under the general issue.⁴ Thus where there was a parol agreement between a lessor and lessee, that the interest accruing on a sum of money, due from the former to the latter, should be retained by the lessor and applied to the payment of the rent, as it became due, it was holden in an action on the covenants of the lease, to recover the rent, that the lessee might retain, and *set-off* the rent, against the interest, pursuant to the agreement, it being considered in the nature of a payment.⁵

¹ *McDonald v. Webster*, 2 Mass. Rep. 498. *Jarvis v. Rogers*, 15 Mass. Rep. 407.

² *Ibid.*

³ Stat. 1784. ch. 2. *Sewall et al. v. Sparrow*, 16 Mass. Rep. 24.

⁴ *Wilby v. Harris*, 13 Mass. Rep. 496.

⁵ *Farley v. Thompson*, 15 Mass. Rep. 18.

When a promissory note is indorsed by the payee, to a third person, for the purpose of preventing the maker from availing himself of his right to *set-off*, he may give in evidence under the general issue in an action by the indorsee, his demands against the indorser.¹

What will destroy the right of set-off. If the plaintiff had assigned his claim for a valuable consideration, before the debts due the defendant were contracted, and notice was given to the defendant, the latter cannot *set-off* such debts.² But an assignment afterwards, although notice is given to the defendant, will not deprive him of the right of *set-off*.³

If the debtor, however, after the assignment, promise the assignee, to pay him the debt, without reserving the right of setting off his demands, or if the debtor have notice of the intended assignment, and make no objection and give no notice of his counter demands, he will be precluded from availing himself of them, in the way of *set-off*.⁴

It is no objection to the *set-off*, that the defendant has commenced a suit against the plaintiff, upon his demands; nor, if the plaintiff be the indorsee of a discredited promissory note, that a suit has been commenced, and is pending, and defaulted, against the indorser, on the demands against him, which are filed.⁵

¹ *Stockbridge v. Damon*, 5 Pick. Rep. 223.

² Vide *Hallowell and Augusta Bank v. Howard*, 13 Mass. Rep. 235.

³ *Hatch v. Greene*, 12 Mass. Rep. 195. *Goodwin v. Cunningham*, 12 Mass. Rep. 193.

⁴ *Jones v. Witter*, 13 Mass. Rep. 304. *Gardiner v. Corson*, 15 Mass. Rep. 500.

⁵ *Sargent v. Southgate*, 5 Pick. Rep. 312.

But if judgment had been entered in such action, it would have merged the demand, and probably prevented its being allowed in *set-off*.

If the plaintiff discontinue his action, after the defendant has filed his account, there is an end of the suit, and the defendant cannot have any judgment for the account filed by him, though he will be entitled to his costs.¹

Incidents to set-off. A defendant, who has demands against the plaintiff, which may be filed in *set-off* under the statute, is not obliged to avail himself of this privilege, but may commence a separate action for the debt due to him.²

When by reason of an account filed in *set-off*, the plaintiff's damages are reduced to an amount less than *twenty dollars*, he nevertheless recovers full costs;³ this would be otherwise, if the items in the account were delivered *in payment* of the plaintiff's demand.⁴

SECT. II. SETTING OFF JUDGMENTS.

When judgments in cross-actions are recovered at the same term, the court, in which the judgments are rendered, will, on application, *set-off* one judgment against the other, so far as the same will extend, and issue execution for the balance; and for that purpose,

¹ *Holland v. Makepeace*, 8 Mass. Rep. 418.

² *Minor v. Walter*, 17 Mass. Rep. 237.

³ *Barnard v. Curtis*, 8 Mass. Rep. 535.

⁴ Vide ante page 316.

either action may be continued, until judgment can be rendered in both.¹

This power is assumed by the court, for the furtherance of justice, and does not depend upon any statutory provision.² The court will exert this power liberally, for the purposes of equity, by continuance of cases, until judgment in a cross-action can be rendered, and even for the purpose of enabling a party to commence a suit for that purpose. No reference is had to the cause of action on which the judgment in the cross-action is rendered, for whether originating in contract or tort, the certainty and extent of the claim, is rendered equally obvious by the verdict.

Judgments may be *set-off* against each other, when a part only of the debtors on one side, are creditors on the other, and even where a part of the debtors on one side, are joint creditors with others, if those others consent to such an arrangement.³

In an action by a Judge of Probate on a probate bond, brought for the benefit of an heir, legatee, or other person, the judgment will be *set-off* against a judgment recovered by the defendant, against such person, although the judgments are not in form between the same parties.⁴

But the court will not permit one judgment to be *set-off* against another, between the same parties,

¹ *Makepeace v. Coates*, 8 Mass. Rep. 451. *Greene v. Hatch*, 12 Mass. Rep. 195. *Hatch v. Greene*, 12 Mass. Rep. 195. *Adams et al. v. Manning et al.* 17 Mass. Rep. 178. *Winslow v. Hathaway et al.* 1 Pick. Rep. 211.

² *Mitchell v. Oldfield*, 4 Term. Rep. 123.

³ *Hathaway v. Russell*, 16 Mass. Rep. 473. *Mitchell v. Oldfield*, 4 Term. Rep. 123.

⁴ *Barrett v. Barrett*, 8 Pick. Rep. 342.

when it appears that persons other than the nominal parties are interested, by the assignment of the demand, on which one of the suits was commenced.¹

But if both the demands were in existence at the time of the assignment, the courts will *set-off* the judgments, though an assignment may have been made, before the commencement of the suit. The assignee takes it subject to all the equities that may be attached to it.² If, however, at the time of the assignment, the assignee of the debtor give notice of it to the creditor, who discloses no counter claim, but conceals his intention to claim a *set-off*, until an action is commenced by the assignee, this will be considered as a waiver of a right to *set-off* the judgments, and an acquiescence in the assignment :³ so a promise by the creditor to pay to the assignee of the debtor, takes away the right of *set-off*.⁴

In setting off judgments, the court will always protect the attorney, in his lien for fees, disbursements and costs.⁵

By *Stat. 1823. ch. 118.* it is provided, that in suits brought against an inhabitant of this state, by one not resident and having no property therein to be attached, the defendant, pending the suit, may commence one against the plaintiff in any court of competent jurisdiction, and the service of the writ, upon the agent or attorney of record, of the *non-resident* plaintiff, or by leaving a legal summons at his last and usual place of abode, will be sufficient for all intents and purposes.

¹ *Makepeace v. Coates*, 8 Mass. Rep. 451.

² *Goodwin v. Cunningham*, 12 Mass. Rep. 193.

³ *King v. Fowler*, 16 Mass. Rep. 397. 19 Johns. Rep. 49.

⁴ *Mowry v. Todd*, 12 Mass. Rep. 281,

⁵ *Mitchell v. Oldfield*, 4 Term. Rep. 123.

And when the parties have obtained their judgments, the court, on application of either party, will *set-off* the judgments, except the taxable costs, so far as to have the balance only of the largest judgment to be executed.

SECT. III. SETTING OFF EXECUTIONS.

By *Stat. 6. Geo. II. c. 2. s. 2.* adopted here soon after its enactment, and in substance re-enacted by *Stat. 1810. ch. 84.* it is provided, that when it shall so happen that any officer, authorized by law to serve executions, shall have several, wherein the creditor of one is debtor in the other, he shall cause one execution to satisfy the other, so far as the same will extend, except where the creditor in the one is not debtor in the same capacity in the other. This statute extends to those cases only, where the several executions are directed to the same officer, for it is only in that case, that they could be put into the same officer's hands for service.¹

But by *Stat. 1830. ch. 124.* it is provided, that when any officer authorized by law to serve executions, shall have in his hands any execution directed to him, and the execution debtors, or any of them, shall have any execution then in force against the creditor on the first execution, and shall request the officer to accept said execution, as far as it will extend in satisfaction of the other, he is bound to receive the same and to apply it in satisfaction of the other as far as it will go, whether the same were legally

¹ *Goodenow v. Buttrick*, 7 Mass. Rep. 140.

directed to him or not. This act extends only to executions, wherein the creditor in one is, in the same capacity or trust, debtor in the other, and does not affect the lien, which any attorney may have upon any judgment or execution, for his services and disbursements, nor the right of any person, to whom, or for whose benefit, any cause of action, judgment or execution may have been legally and *bona fide* assigned.

CHAPTER II.

AMENDMENT.

Amendments are either at common law, or by statute. At common law, there was little room for amendments, for, according to *Britton*, the judges were to record the *parols*, or pleadings, deduced before them in judgment; but they were not to erase their records, nor amend them, nor record against their inrollment.¹

All mistakes, however, were amendable at common law, during the term in which they were made; and an amendment was sometimes permitted afterwards, as in the recital of a writ, or the entry of a continuance.² So at common law, when the pleadings were orally made at the bar of the court, if any error was perceived in them, it was presently amended.³ Afterwards, when the pleadings came to be *in paper*, it was thought but reasonable that the parties should have the like indulgence.⁴

In the English practice, whilst the proceedings are *in paper*, the amendment is at common law, and not within any of the statutes of amendment, which relate only to proceedings of record.⁵ And there is no difference at common law, between *civil and criminal* cases, nor between *penal and other actions*. Thus

¹ 4 Inst. 255. Gilb. C. P. 107.

² 8 Co. 157. Gilb. C. P. 108.

³ Ibid.

⁴ 2 Salk. 520.

⁵ 1 Salk. 47, 3 Salk. 31.

in a *qui tam* action for usury, the plaintiff was permitted to amend his declaration, by altering the date of a note, after issue joined and entered on the roll, and after many terms had elapsed, since the commencement of the action;¹ and a similar amendment was allowed to be made in a case, where the record had been made up for trial, and withdrawn on discovering the mistake.² Where there has been no unnecessary delay on the part of the plaintiff, in a penal action, the court will grant leave to amend the declaration, even after the time has expired, in which the plaintiff is allowed to bring a new action.³ There is said to be no instance, in which the court have given leave to amend, to the parties in a *qui tam* action, after demurrer.⁴

When the proceedings are entered on the record, the court will grant leave to amend, only so far as is allowable by the statutes of amendments.⁵

The first statute upon the subject of amendment is 14 *Ed. III. c. 6.* which enacts that “no process shall be annulled or discontinued, by misprision of the clerk, in writing one syllable or letter too much, or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form.” This statute was construed so favorably, as to be extended by the judges to a *word*.⁶

And by the 9 *Hen. V. c. 4.* made perpetual by

¹ 1 Salk. 51. 2 Tidd's Pract. 633. and the cases there cited. *Bonfield q. t. v. Milner*, 2 Burr. Rep. 1098.

² *Mace q. t. v. Lovett*, 5 Burr. Rep. 2833.

³ *Cross v. Kaye*, 6 Term. Rep. 543.

⁴ Per Buller J. *Evans q. t. v. Stevens*, 4 Term. Rep. 228.

⁵ Gilb. C. P. 114, 115. Tidd's Pract. 641.

⁶ 8 Co. 157 a.

4 *Hen. VI. c. 3.* the same power to amend is extended to the court, as well *after* as *before* judgment, so long as the record and process are before them. By *Stat. 8. Hen. VI. c. 12.* the justices are farther empowered to examine and amend what they shall think, in their discretion, to be the misprision of their clerks, in any record, process, word, plea, warrant of attorney, writ, panel or return. And by *Stat. 8. Hen. VI. c. 15.* they may amend the misprisions of their clerks, and other officers, as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise, in writing a letter or syllable too much or too little. These are properly speaking, the only English statutes of *amendments*;¹ and they do not extend to criminal cases, or penal actions.² The subsequent statutes upon this subject, are statutes of *jeofails*.³

The distinction between the statutes before cited, and the statutes of *jeofails*, is this: the former apply to process out of the roll, viz: writs that issue out of the record, and not to proceedings in the roll itself; they only extend to what the justices should interpret the misprision of their clerks and other officers; it being found, therefore, by experience, that many just causes were overthrown *for want of form*, and other failings, and that though good in substance, they were not aided by the statutes of amendments, the statutes of *jeofails* were made.⁴

By *Stat. 32. Hen. VIII. c. 30.* “if the jury have

¹ 1 Salk. 51.

² Ibid. 2 Ld. Ray. Rep. 1307. Gilb. C. P. 116.

³ Tidd's Pract. 642.

⁴ Gilb. C. P. 111. Jac. Law Dic. tit. Amendment. Comyn. Dig. tit. Amendment, C. 1.

once passed upon the issue, though afterward there be found a *jeofaile* in the proceedings, yet judgment shall be given according to the verdict."

By *Stat. 18. Eliz. c. 14.* "after verdict given in any court of record, there shall be no stay of judgment, or reversal, for want of form in any writ, count, plaint, &c. or for want of any writ, original or judicial, or by reason of insufficient returns of sheriffs, &c."

By *Stat. 21. Jac. I. c. 13.* "if a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form, between the original writ or bill, and declaration, &c. or for want of averment of the party being living, so as he is proved to be in life; or for that the *venire facias*, is in part misawarded; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a panel of jurors be returned and annexed to the writs; or for that the return officer's name is not set to the return, if proof can be made that the writ was returned by such officer, &c."

By *Stat. 16 and 17. Car. II. c. 8.* "judgment shall not be stayed or reversed after verdict, in the courts of record at Westminster, &c. for *default in form*; or for that there are not pledges to prosecute on the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alleging and bringing into court of any bond, bill or deed, or of alleging or bringing in letters testamentary, or of administration; or for the omission of *vi et armis* or *contra pacem*, mistaking the christian or surname of either party, or the sum of money, day, month, or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of

the averment *hoc paratus, &c.* or for not alleging *prout patet per recordum*, for want of profert of deeds, for that there is no right *venire*, if the cause was tried by a jury of the proper county or place; nor shall any judgment, after verdict, by confession, *cognovit actionem, &c.* be reversed for want of *misericordia* or *capiatur*, or by reason that either of them are entered, the one for the other, &c. but all such defects, *not being against the right of the matter of the suit, or whereby the issue or trial is altered*, shall be amended by the judges, though not in suit of appeal, of felony, indictments, and informations on penal statutes, which are excepted out of the act."

The statute last cited, is called by Twisden J. an omnipotent act,¹ and was followed by *Stat. 4 and 5. Anne c. 16.* by which, that and all the statutes of *jeofails* were extended to judgments entered by confession, *nil dicit*, or *non sum informatus*, in any court of record, so that no judgment should be reversed, nor any judgment or writ of inquiry of damages thereon, should be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there was an original writ filed, &c.

By *Stat. 9. Anne c. 20, s. 7.* this last and all other statutes of *jeofails* are extended to writs of *mandamus*, and *informations* in the nature of a *quo warranto*,—the statutes of amendments and *jeofails* not having been construed to extend to criminal proceedings, or on penal statutes generally.²

By the foregoing statutes, the faults and mistakes of clerks are amendable in many cases; as where the

¹ 1 Vent. Rep. 100.

² Bul. N. P. 325.

misprision is of a matter in fact, it is amendable, though not in matter of law.¹ If there be a mistake in the legal form of the writ, it is not amendable. There is, therefore, this diversity between the negligence and ignorance of the clerk, that makes out writs :—for his negligence, (as if he have a copy of the bond, and do not pursue it,) this shall be *amended* : but his misprision through ignorance in the legal form of original writs is not amendable.²

No defects of substance are within any of the statutes of jeofails before cited, as these merely extend to defects of form.³

By *Stat. 1784. ch. 28. s. 14.* it is enacted “that no summons, writ, declaration, process, judgment or other proceedings in the courts, or course of justice, shall be abated, arrested, quashed, or reversed for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood by the court, nor through defect, or want of form only.”

By *Stat. 1817. ch. 63. s. 1.* it is enacted, “that in any action of review, pending in the Supreme Judicial Court, the justices thereof shall have power to order any amendment of the original writ, record or proceedings, in any part thereof, upon such terms and conditions as they may consider just and reasonable.”

The principal statutes have been cited, upon the subject of amendments and jeofails, which are applicable to our practice. It is not within the scope of this work to refer to the numerous decisions upon them,

¹ Palm. Rep. 258.

² 8 Rep. 159. as to what shall be a misprision or defect in form. Vide Comyn. Dig. tit. Amendment, I. V. and W.

³ Per Buller *J. Ward v. Honeywood*, Dougl. Rep. 63.

except as they come up hereafter, and are applied to the various divisions of the subject of this chapter. There seems now to be no limitation to the power which the common law courts possess, of granting amendments in all cases of defects of form, and this power they are disposed to exercise very liberally, and will always allow amendments in matters of form, on motion, as of course.¹

With regard to amendments in matters of substance, the power of the courts in this state is very extended. By *Stat. 1782. ch. 9. s. 4.* the Supreme Court is empowered to make rules respecting modes of trial and the conduct of business at its discretion, provided the same be not repugnant to the laws of the Commonwealth: and by *Stat. 1784. ch. 28. s. 14.* a general power is given to the court, to order amendments on motion, without limiting the discretion of the court, as to the nature of the amendment, or the terms on which it may be ordered. This power or discretion is limited, however, to granting amendments, in matters of substance, where they shall appear to be consistent with the original cause of action, and not to cases, where the amendment would vary the nature of the pleading; as to alter a plea of *debt* to *case*, or in a writ of *entry*, to alter it to a writ of right.²

By a rule of the Supreme Court,³ amendments in matters of substance may be made, in the discretion of the court, on payment of costs, or on such other terms as the court shall impose, but if applied for after

¹ Reg. Gen. S. J. C. 8. Appendix A.

² *Haynes et ux. v. Morgan*, 3 Mass. Rep. 210. *Phillips et al. v. Bridge*, 11 Mass. Rep. 242.

³ Reg. Gen. S. J. C. 9. Appendix A.

joinder of an issue of fact or law, the court will, in their discretion, refuse the application, or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case require it. But no new count, or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

The court, however, may, notwithstanding the above rule, grant any amendments of substance in other cases, or in those provided for by the rule, upon other terms, according to its discretion, until it shall be further limited by some new rule.¹

The discretion of the court in granting amendments, may be exercised by a single judge presiding, as when holden by three or more justices, and if the case come within his discretion, the exercise of it can neither be corrected, appealed from, or controlled.²

The particular cases will now be considered wherein the amendments are allowable, either at common law, or by statute.

SECT. I. WHAT MAY BE AMENDED AND HOW.

As to writs. If a wrong writ be sued out, as if a *capias* should be issued against an executor, or a corporation,³ or a writ of attachment, in dower,⁴ or a writ of summons and attachment, in a real action,⁵ the mis-

¹ *Haynes et ux. v. Morgan*, 3 Mass. Rep. 208.

² *Ibid.*

³ Ante page 56.

⁴ Ante page 77.

⁵ Ante page 61.

take cannot be amended, it being an error in substance, which in either case renders the writ void, and not an error of form merely.¹ So also, if an original summons be served, as a *capias* and attachment, and returned as such by the officer, no amendment will be allowed, as none could set it right, and make that service good and valid, which was originally bad. No decisions in our courts will be found reported upon these points, but they clearly come within the principles heretofore stated upon the subject.²

Teste, seal, and signature. The *teste* of a writ, may always be amended on motion;³ but a mistake in the *seal*, and, it seems, in the *signature* of the clerk, cannot be amended.⁴

In *Maine*, however, it has been decided, that if the clerk omit to affix the seal of the court to an execution, it may be amended, even after the execution has been extended on land, and the extent recorded.⁵ And in *New York*, where a writ had been issued and served, without any signature by the clerk of the court, to which it was returnable, it was holden not to be void; but capable of being amended, by the clerk's putting his signature thereto, after it was returned.⁶

Direction to officer. The direction in the writ to the officer may be amended, where the writ has been properly served.⁷ So the return-day of writs are, in prac-

¹ Ante page 359.

² Ante page 360. Vide *Hall v. Jones*, 9 Pick. Rep. 446.

³ *Ripley v. Warren*, 2 Pick. Rep. 592.

⁴ *Hall v. Jones*, 9 Pick. Rep. 446.

⁵ *Sawyer v. Baker*, 3 Greenleaf Rep. 29.

⁶ *Pepoon v. Jenkins*, Coleman's Ca. 55.

⁷ *Hearsey v. Bradbury*, 9 Mass. Rep. 95. *Wood v. Ross*, 11 Mass. Rep. 276. *Campbell v. Stiles*, 9 Mass. Rep. 217.

tice, commonly permitted to be amended, and no instance of refusal is known.

Returns of writs. It is a common practice for the officer to amend his return on writs, after they have been served, provided the mistake be in the return, and not in the service : and during the pendency of the action, it is believed to be common and proper for the officer who made the service, either to make his return *de novo*, or to amend, or to complete it, when incomplete. No limitation has been imposed upon the power of granting amendments in such cases.

Where the officer had merely made minutes of the time and mode of service of a trustee process on the principal and trustee, but had not completed and signed his return, he was permitted to complete it, after he had ceased to be an officer.¹

After judgment in the suit, in which the return is made, the rule is equally unrestricted, and amendments will then be granted, whenever the court think proper in their discretion, to allow them to be made. In the case of *Thatcher et al. in error v. Miller*,² the Court of Common Pleas, refused to allow an officer to amend his return, *six years* having elapsed since the return was made, and Parker C. J. in delivering the opinion of the Supreme Court, says, “ if the precept had originally issued from this court, we are inclined to think that we should not, so long after the transaction, permit the officer to amend his return. More than six years have elapsed since the return was made; and the deputy sheriff now offers to insert an essential fact, the omission of which

¹ *Adams et al. v. Robinson & Tr.* 1 Pick. Rep. 461

² 13 Mass. Rep. 270.

may render him liable to an action for damages. It would be unsafe to expose officers to so much temptation."

But amendments may be allowed, not only after judgment, but even after a writ of error has been brought, to reverse the judgment.¹

Amendments are not allowed, which affect the interest of third persons, not parties to the suit; as where an officer, in his return of an attachment of an equity of redemption, misdescribed the land, he was not allowed to correct the mistake, in an action afterwards brought against the purchaser under the levy and sale upon execution, by a subsequent purchaser from the original defendant.² It was thought, however, until very lately, that during the pendency of a suit, such an amendment might be made, as against all persons, and officers have frequently been permitted to correct in their returns, the description of the property attached, the boundaries and quantity of land, and to include in it other property not before described; for as there is no precise time, within which a return must be absolutely completed, the power of granting leave to amend in such cases seemed to be fully within the discretion of the court, at least during the pendency of the suit. The recent case of *Emerson v. Upton*,³ has imposed great restrictions upon this practice. It was there held that an amendment by an officer, at the second term, during the pendency of the suit, of the date of his return upon the writ,

¹ *Thatcher et al. in error v. Miller*, 11 Mass. Rep. 413. *Same v. Same*, 13 Mass. Rep. 270.

² *Williams et al. v. Brackett*, 8 Mass. Rep. 240.

³ 9 Pick. Rep. 167.

showing the time, when the attachment of certain real estate was made, should not affect the rights of a third person acquired under a mortgage, recorded before the date of the attachment as first returned, although it appeared, that the date in the officer's return, "June 6, 1827," instead of "March 6, 1827," as amended, was a mistake, and should have originally been the latter instead of the former. Parker C. J. in delivering the opinion of the court, says, "it will be found on examination of the cases, in which amendments of writs have been granted, that the effect of them, when any change has been made, has been limited to the parties to the suit, in which the amendment is granted."

In the case of *Freeman v. Paul*,¹ it was holden, that after a bill in equity is brought to redeem mortgaged premises, the officer, who executed the writ of *habere facias*, under which the mortgagee entered, cannot amend his return, by stating an earlier day of service, for the purpose of foreclosure.

The result of the authorities clearly is, that whatever amendments, either of writs, or of the returns thereon, may be allowed, whether before or after judgment in the suit, they will never be permitted, so as to affect the rights of third persons, not parties to the suit.²

Ad damnum. It is usual to grant the plaintiff leave to increase his *ad damnum*, as of course, upon motion. Even after verdict, where it was for a sum larger than the *ad damnum*, leave has been given to amend by increasing it, and a new trial ordered to enable the defendant to contest the enlarged de-

¹ 3 Greenleaf Rep. 260.

² This will be more fully considered hereafter.

mand.¹ And in the Court of Common Pleas, it is within their discretion, to allow the plaintiff in a suit to increase the *ad damnum* of his writ, for the purpose of enabling him to appeal.²

In the case last cited, it does not appear, whether the amendment was allowed before or after verdict, but that court has, in other instances, refused to allow the amendment after verdict for the defendant, and probably would never permit the plaintiff thus to take his chance for a verdict against the defendant, who could not appeal, before the plaintiff thus amended his writ.

In *New Hampshire* it has been decided, that where the *ad damnum* in the writ is left blank, or is below the jurisdiction of the court, no amendment can be allowed, and that the defect is incurable. The court say, "the objection to our jurisdiction, and consequently to our right to grant an amendment, or make any other order as to the cause, than to dismiss it, is not a personal privilege, which may be waived by pleading over, but the defect is one which must be noticed *ex officio*."³ It may be considered as doubtful, whether the reasoning of the court, in the case last cited, is applicable, in its fullest extent, in this state. The formal allegation of damages, greater than *twenty dollars*, is required by statute, and if an *ad damnum* over *twenty dollars* be inserted, the court have jurisdiction, even if the actual demand be for a less sum; the refusal, therefore, to permit an amendment of this nature, can only be supported upon the technical ground taken by the court in the case above cited.

¹ *Tomlins et al. v. Blacksmith*, 7. Term Rep. 132. *Scutt v. Woodward*, 1 H. Black Rep. 238.

² *Danielson et al. v. Andrews et al.* 1 Pick. Rep. 156.

³ *Hoit v. Molony*, 2 New Hamp. Rep. 322.

The same technicality would exclude the amendment of an officer's return, where a sufficient service has been made, but the return is defective in setting it forth, though such an amendment is clearly within the discretion of the court, as against the defendant, even if he have never appeared, and have been defaulted, and the judgment entered upon the default.¹ And in the case of *McLellan v. Crofton*,² it was decided by the Supreme Court in Maine, that the plaintiff might amend his writ, by inserting an *ad damnum*, which through inattention, had not been inserted in the original writ. In adverting to the objection that was made, that, as the plaintiff inserted no *ad damnum*, the Court of Common Pleas had no jurisdiction of the cause, and that, therefore, the Supreme Court had none, Mellen C. J. said, "if we are referred to the record, we must look to the whole of it. An account of some thousands of dollars is annexed to the writ, and the verdict which the jury have returned, has established the plaintiff's claim to a large amount, showing that legal jurisdiction over it appertained to the Court of Common Pleas, and now belongs to this court. It would be matter of regret, if not of reproach to our laws, and to the administration of them, if such a motion could not be sustained. We entertain no doubt upon the point."

Of the declaration. Where no declaration is contained in the writ, when it is served, the plaintiff can not amend by inserting one ;³ but if any declaration,

¹ *Adams et al. v. Robinson et al. & Tr.* 1 Pick. Rep. 461. Vide ante page 363.

² 6 Greenleaf Rep. 307.

³ *Brown v. Seymour & Tr.* 1 Pick. Rep. 32. *Brigham v. Este*, 2 Pick. Rep. 420. *Rathbone v. Rathbone*, 5 Pick Rep. 221.

however informal, be made, purporting to be a declaration, it may be amended in all matters of substance, as well as of form, within the meaning of amendments, if no new cause of action be introduced.¹

In all cases of misnomer, and of mistake in the addition, description and residence of the parties,² or even in the misnomer of a corporation that is sued, an amendment will be allowed, in any stage of the cause, before the verdict.³ So, where an infant sued in his own name, an amendment, by inserting the name of his *prochien amy*, was allowed, even after a plea in abatement.⁴ So all clerical errors, as omissions, and the improper use of figures and abbreviations, are amendable of course, as is also a wrong *venue*, and even the description of a note, as to the place of the date of a note, may be amended.⁵ The plaintiff cannot amend his declaration, when the effect of it is to change the form of action, as from *debt* to *case*, or from a writ of *entry* to a writ of *right*;⁶ but in cases of misjoinder of actions, as *tort* with *assumpsit*, an amendment, by striking out a misjoined count, is allowable.⁷

As to plaintiffs and defendants. Amendments of the declaration in matters of substance, are allowed to a great extent, the general practice being, to allow all

¹ Reg. Gen. S. J. C. 8. 9. Appendix A. 11th Rule C. C. Pleas. Appendix B.

² *Kincaid v. Howe*, 10 Mass. Rep. 203.

³ *Sherman v. Conn. Riv. Bridge*, 11 Mass. Rep. 338. *Ballard v. Nantucket Bank*, 5 Mass. Rep. 99. *Anderson et al. v. Brock*, 3 Greenleaf Rep. 243.

⁴ *Blood v. Harrington*, 8 Pick. Rep. 552.

⁵ *Munroe v. Cooper et al.* 5 Pick. Rep. 412.

⁶ *Haynes et ux. v. Morgan*, 3 Mass. Rep. 210. *Denny et al. v. Ward*, 3 Pick. Rep. 199.

⁷ *White v. Snell*, 5 Pick. Rep. 425.

that are consistent with the original declaration, and which introduce no new cause of action.¹ The question has been frequently raised, whether, under the rule as thus stated, an amendment is allowable, by striking out the name of one of the plaintiffs or defendants in an action.

Striking out a plaintiff. In *Rehoboth et al. v. Hunt*,² which was a suit commenced by two towns against the defendant, Parker C. J. in delivering the opinion of the court, says, “but this difficulty might be avoided, by striking out one of the plaintiff towns, which the court would authorize, if the action could be maintained by either of the towns alone.” In that case, however, the point was not directly presented, and it cannot be considered, therefore, as having the weight of an authority. In *Adams et al. v. Leland et al.*³ the plaintiffs were trustees of a charity, and it being necessary to make one of their number a witness, he resigned pending the action; and it was holden, that the suit was thereby abated.

Striking out a defendant. In all actions in form *ex delicto*, the plaintiff may, at his pleasure, discontinue against one or more of several defendants; but in actions in form *ex contractu*, he cannot without special leave of court. In the English courts of common law, this leave is never given, and a plaintiff who has, through inadvertence, included too many defendants, must fail in his action;⁴ and it makes no difference, in such cases, that the defendant, who is improperly included, confesses the action, or is defaulted.

¹ Reg. Gen. S. J. C. 9. Appendix A. 11th Rule C. C. Pleas. Appendix B.

² 1 Pick. Rep. 224.

³ 7 Pick. Rep. 62.

⁴ 1 Chitt. Plead. 33.

In this state, the practice has prevailed, to permit an amendment by discontinuing as to any defendants, in actions *ex contractu*, upon motion made while the action is pending ; thus in an action on the covenants in a deed made by husband and wife, brought against both, the plaintiff was permitted to amend, by striking the wife's name out of the writ and declaration.¹

In the case of *Minor et al. in error v. The Mechanics' Bank*,² this subject was fully considered, and Story J. after an elaborate examination of the authorities, says, "the authorities, and particularly the American, proceed upon the ground, that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that therefore this court is left at full liberty to entertain such a decision, as its own notions of general convenience and legal analogies, would lead it to adopt. We are of opinion, that where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice."

In the recent case of *Tuttle v. Cooper et al.*³ two of three defendants were defaulted; the third pleaded that he did not promise jointly with the others, and upon issue joined upon this plea, a verdict was found for the defendant, and judgment rendered thereon. It was holden by the court, that the plaintiffs were not entitled

¹ *Colcord et al. v. Swan et ux.* 7 Mass. Rep. 291.

² 1 Pet. S. C. Rep. 46, 80.

³ 10 Pick. Rep. 281.

to judgment against the two, who were defaulted. The court, in this case, both overlooked and overruled the case of *Colcord et al. v. Swan et ux.*¹ and have, by their decision, gone back to the strict rule of the English practice, before stated. The case of *Minor et al. v. Mechanics' Bank*,² was referred to by the court, and laid aside, as having no bearing upon the general question, because it differed materially in its circumstances from the case at bar, the proceedings in the Circuit Court, as to entering a *nolle prosequi* against one defendant, having passed in the court below, without objection.

The rule may now, therefore, be considered as settled in this state, that in actions *ex contractu*, against two or more, the contract must be proved as laid, and that in a trial upon the general merits, the plaintiff cannot have a judgment against one or more, where all are not liable, and that an amendment, by entering a *nolle prosequi* against one or more co-defendants, will not be allowed.

To this rule however, there is an exception, that where a defence is made by one or more of the defendants, in which the joint contract is admitted, but some matter of personal exemption or discharge is set up, such as infancy,³ coverture,⁴ bankruptcy,⁵ and the like, the plaintiff may enter a *nolle prosequi* as to such defendants, and proceed against the other contracting parties, and may have a judgment against them, al-

¹ Ante page 370.

² Ante page 370.

³ *Woodward v. Newhall et al.* 1 Pick. Rep. 500. *Hartness v. Thompson*, 5 Johns. Rep. 160.

⁴ *Ibid.*

⁵ *Moravia v. Hunter*, 2 M. & S. 444. *Noke v. Ingham*, 1 Wils. Rep. 89.

though the party pleading in discharge of himself, recover judgment against the plaintiff.¹

In *Maine*, the Supreme Court have decided, that in actions *ex contractu* against two or more, the plaintiff cannot amend, by striking out the name of one of the defendants;² and in another case,³ they refused leave to amend, by striking out the name of one of the demandants in a writ of entry, which had been improvidently inserted.

Adding a plaintiff. An amendment, by adding other plaintiffs, cannot be made.

Adding a defendant. In *Denny et al. v. Ward*,⁴ Parker C. J. expressed a doubt, whether the addition of a defendant was the subject of amendment, saying, "it was making new parties;" but now by *Stat. 1833. ch. 194.* it is provided, that, at any time before issue joined, in a plea of non-joinder of a party, as defendant in any action, founded on debt or contract, the plaintiff may, on motion, on such terms as the court shall prescribe, be allowed to amend his writ and declaration, by inserting therein the name of any other persons, as defendants, and a new writ, in the form prescribed by law, containing the amended declaration, or such part thereof as the court shall direct, shall be issued against the defendants named therein, returnable at such time as the court, before which the action is pending, shall direct, not less than the time allowed by law for similar process.

When the original writ is lost or destroyed. In cases of inevitable accident, or the unaccountable dis-

¹ *Tuttle v. Cooper et al.* 10 Pick. Rep. 281, 291.

² *Redington v. Farrar et al.* 5 Greenleaf Rep. 379.

³ *Treat et al. v. McMahon*, 2 Greenleaf Rep. 120.

⁴ 3 Pick. Rep. 199.

appearance of a writ from the files of the court, during the pendency of a suit, justice requires that the loss should be supplied. This can of course be done, only upon exact proof of the contents of the writ, supported by the affidavit of the attorney in the cause, who must set out such contents, if possible, and state that the original has not been lost through design, and that thorough search has been made for it. In *Bean v. Elton*,¹ the court ordered a new writ, in place of the one lost, to be made out and filed. And where writs have been taken from the files, and lost through accident by the attorney, it is usual to proceed upon a copy furnished by him, made from the memoranda in his possession, or on file. This, however, is dangerous practice, and would not be allowable, except by consent, unless the party furnishing the copy, could make affidavit, that it was a true and exact copy of the original writ, and, that the original had been lost, without fault or design on his part.²

*Amendments must not introduce a new cause of action.*³ The authorities, where this rule has been the governing principle of decision, being in some degree conflicting, we have cited them at large, for the more convenient examination of the reader.

Where a promise was alleged to be with interest, the plaintiff having proved a promise, but not to pay interest, was allowed to amend by striking out the allegation.⁴

¹ 2 Strange, 1077.

² Vide *Jackson ex. d. Smith v. Hammond*, 1 Caines' Rep. 496. *The People v. Burdock et al.* 3 Caines' Rep. 104. *Petrie v. Benfield*, 3 Term. Rep. 476.

³ Reg. Gen. S. J. C. 9. Appendix A. 11th Rule C. C. Pleas. Appendix B.

⁴ *Tappan et al. v. Austin*, 1 Mass. Rep. 31.

In trespass, *quare clausum fregit*, commenced before a justice of the peace, and carried to the Court of Common Pleas, on a plea of title, the plaintiff was permitted to amend, by alleging *other* torts in the *same* close, with a more particular description of the close, the defence not being varied.¹

Where the plaintiffs declared, as executors on a promise to the testator, and the defendant pleaded the statute of limitations, the declaration was amended by averring the promise to be to the plaintiffs themselves, though the court held the amendment to be unnecessary.² And where the defendant is sued in a particular capacity, the plaintiff may amend and charge him in another; as in an action for a legacy, against one as *executor*, to charge him as *devisee*.³

In an action on the *Stat. 1804. ch. 125.* against a turnpike corporation, for an injury sustained through a defect in the road, the plaintiff having omitted to aver, that he was a person from whom toll was demandable, was permitted to amend, by inserting the averment, after judgment on the verdict in his favor.⁴

Where C indorsed in blank, a note given by A to B, and B declared against C, as on an indorsement, he was permitted to amend, by declaring as on a guaranty.⁵

Where the declaration alleged that the defendant maliciously sued the plaintiff, and attached his property, an amendment was granted, alleging that he mali-

¹ *Cummings v. Rawson*, 7 Mass. Rep. 440.

² *Baxter v. Penniman*, 8 Mass. Rep. 133.

³ *Leighton v. Leighton*, 1 Mass. Rep. 432.

⁴ *Williams v. Hing. Turnp. Corp.* 4 Pick. Rep. 341.

⁵ *Tenney v. Prince*, 4 Pick. Rep. 385.

ciously detained it, after he knew he had no cause of action.¹

In an action on the case against a sheriff, for returning bail to the action, where no bail was taken, the Supreme Court of Maine refused to permit the plaintiff to amend, by inserting a count for not delivering up the bail-bond mentioned in the officer's return.²

A declaration on a note as indorsed generally, was amended after verdict, by describing the indorsement as a restricted one.³

A declaration, that the defendant as administrator, being indebted to the plaintiff for money had and received, promised him, &c. was amended by stating that the intestate promised. Under the count so amended, the plaintiff offered to prove a note payable after the action commenced, and that the estate of the intestate being insolvent, he had laid it before the commissioners, who had rejected it; but this being holden inadmissible under that count, the plaintiff had leave again to amend, by declaring specially.⁴

In *Clark v. Lamb Exor.*⁵ the original declaration by the plaintiff, was for money had and received by the defendant, to the use of the plaintiff, as executor. He was allowed to amend, by inserting a count for money had and received to the use of the testator, and a promise to him, — another for money had and received to the use of the testator, and a promise to the executor, — and a third on an *insimul computassent* between the defendant, and the plaintiff, as executor.

¹ *Stone v. Swift*, 4 Pick. Rep. 389.

² *Eaton v. Ogier*, 2 Greenleaf Rep. 46.

³ *Stanwood v. Scovel & Tr.* 4 Pick. Rep. 422.

⁴ *Eaton v. Whitaker*, 6 Pick. Rep. 465.

⁵ 6 Pick. Rep. 512.

In *Ball v. Claflin*,¹ the original count was for goods sold. The plaintiff amended by filing two new counts, charging the defendant with having received merchandize and promissory notes, as bailiff or factor, and with not having rendered an account thereof, and the amendment was holden to be proper.

In an action on the *case*, for obstructing a triangular piece of land, the plaintiff was allowed, after nonsuit, to amend by calling it a quadrangular piece.²

In an action against a factor as on a *del credere* commission, the plaintiff declared in *indebitatus assumpsit* for a balance of account, and on *insimul computassent*, and was allowed to amend; by declaring against the defendant as a factor simply, and as a factor on a *del credere* commission.³

A promise by the defendant, as bailiff of the plaintiff's merchandize, to transport it free of risks, except of the seas, was amended, and laid to be, to transport and sell, *free of risk until accounted for*.⁴

By the *thirty-first* rule of the Court of Common Pleas,⁵ "in actions of assumpsit for goods sold and delivered, services performed, &c. the plaintiff may declare in *indebitatus assumpsit*, and on motion, file any of the common counts applicable to the case, including also the money counts, and *insimul computassent*."

In *Willis v. Crooker*,⁶ it was held that a declaration consisting of one count on a promissory note, for *one hundred and seventy dollars*, and one for *two thou-*

¹ 5 Pick. Rep. 303.

² *Hill v. Haskins et al.* 8 Pick. Rep. 83.

³ *Swan v. Nesmith et al.* 7 Pick. Rep. 220.

⁴ *Bridge v. Austin*, 4 Mass. Rep. 115.

⁵ Appendix B.

⁶ 1 Pick. Rep. 204.

sand dollars, money had and received, could not be amended by adding a count on an account annexed, for *three hundred and twenty-two dollars*, and two counts on other promissory notes, for *five hundred and ninety-six dollars*. The court say, "it is said the second count would cover the additional counts; but it cannot be ascertained from the record, that it was intended to cover them." On a second hearing, it was contended that if there were in the writ when served, good counts sufficient to support the judgment, the presumption was that it was rendered on those counts. But the court said, the burden of proof lay on the other side, to shew that nothing was added in consequence of the new counts.

In *Tappan v. Taylor*,¹ the court refused leave to amend a declaration for goods sold, by filing a count for a note which had been taken for them on settlement. In *Little v. Little*,² a count on an implied promise to indemnify, was not permitted to be amended, by declaring on a special promise to indemnify in a particular way, — as being for a new cause of action.

It is obviously very difficult to reconcile all the cases on this head with each other, or with any general rule. "The rule is simple and clear," says Ch. J. Parker, in *Ball v. Claflin*,³ "yet it has been found difficult of application." "The new count offered must be consistent with the former count or counts, that is, it must be of the like kind of action, subject to the same plea, and such as might have been originally joined with the others. It must be for the same cause of action,

¹ Hampshire Sup. Jud. Court, Sept. T. 1818, cited in *Vancleef v. Therasson et al.* 3 Pick. Rep. 14. *Ball v. Claflin*, 5 Pick. Rep. 305.

² Cited 3 Pick. Rep. 13.

³ 5 Pick. Rep. 304.

that is, the subject matter of the new count must be the same as that of the old ; it must not be for an additional claim, or demand, but only a variation of the form of demanding the same thing."

The difficulty is, to determine what is the same cause of action, — the same subject matter, — and what is a new cause, or an additional claim. A count for money had and received is not for the same cause, as a count on a note. It *may be* the same — it may embrace a note, but it may also include many other claims. A promise to pay with interest, is not the same as a promise to pay without, — the obstructing a quadrangular piece of land is not the same as obstructing a triangle. Strictly speaking, every amendment to cure a variance, introduces what purports to be a different cause of action : the very reason why an amendment becomes necessary is, that the contract or other thing described, is not the same with the one proved.

The question then is, how is it to be tried, whether the new count is for the same cause. If tried by *the counts themselves*, no amendment of a material nature could ever be introduced, for, tried by that test, they appear to be different.

The rule, therefore, does not mean that the new count must be for the same cause of action, with the former, *as it is stated in the former*. It seems rather to be, that an amended count may be for the same cause, as was *intended to be* declared on, in the original one. What the plaintiff or his attorney intended to declare on, but misdescribed, he may describe anew, though essentially different from the first description. This would be a question of fact to be tried on the motion to amend ; — generally, the circumstances of the case would shew clearly the fact, sometimes an affidavit or

evidence of intention would be necessary. If an attorney should take by mistake a wrong paper, when about to bring a suit, and make the writ upon that, — or, trusting to his memory, should misdescribe it in any or all the particulars, — or if, having it before him, he should mistake the number of dollars or of days, all these errors seem to fall within the same class, and it would be hard to say that being indulged to amend any one, he should not go a step further, and be allowed to amend the next.

“There is but one contract, one cause of action, one single subject matter of the suit. The plaintiff has mistaken the manner of declaring on it. This is the very case where, by virtue of the statute and of the rule, he is entitled to amend.”¹ Within the rule thus stated, all the cases cited from the reports readily fall, unless perhaps, we except the case of *Little v. Little*,² which seems not easily reconcilable with the rest. That was a case of a mere variance evidently made by mistake. The case of *Tappan v. Taylor*,³ where an amendment was refused, was a case where the plaintiff’s attorney did not intend to describe a note, or a claim arising out of a note.

As to the filing of general counts, which from their generality can never *appear to be* for the same cause of action, the result of the cases seems to be, that where the new counts *may be* for the same cause of action, for which the former was, they may be filed. Further than this, no decision has professed to go, nor, without setting the subject entirely afloat, can the practice be

¹ 5 Pick. Rep. 306.

² Cited, 3 Pick. Rep. 13. and *supra*.

³ *Ibid*.

carried. To this full extent, however, it is carried, and seems to be well settled; some cases indeed, must be viewed, as having in fact gone further. The most common and long established amendment of filing the money counts in an action, on a promissory note, can be supported on no other principle; and the rule of the Court of Common Pleas, before referred to, may be, in a great measure, reconciled with it, by a restricted construction.

In set-off. There has been no discussion on the question, whether a defendant may amend his *account filed in set-off*. On the same principles on which declarations are amendable, it would seem he might. The defects would arise from the same cause, and the same reason and necessity exist for the indulgence. There is no precise restriction in the statutes regulating *set-off*, that imposes a different rule.¹

Bill of particulars. A bill of particulars may be amended.²

Pleas. *Pleas in abatement* cannot, it seems, be amended; they are *stricti juris*, dilatory in their nature, and uniformly discountenanced by the courts. This principle is analogous to the rule of practice, requiring pleas in abatement to be made, signed and filed, at a particular day, and which forbids the court from permitting it afterwards.³ And it was accordingly so held in *Lyde v. Heale*,⁴ and is so laid down in the elementary books.⁵ No case is known where an amend-

¹ Vide Stat. 1784. ch. 28. s. 12. Stat. 1793. ch. 75. s. 4.

² *Babcock v. Thompson*, 3 Pick. Rep. 446. Tidd's Pract. 510. 2 Arch. Pract. 222, 270.

³ *Martin in error v. Commonwealth et al.* 1 Mass. Rep. 347. *Cleveland v. Welsh*, 4 Mass. Rep. 591. *Eaton v. Whitaker*, 6 Pick. Rep. 465.

⁴ Prac. Reg. 21.

⁵ 1 Sell. Prac. 275. Imp. K. B. 242. 2 Arch. Prac. 271.

ment to a plea in abatement was ever allowed, and it is expressly decided in *Trinden v. Durant*,¹ notwithstanding the statute of *New York* authorized the count to amend "any process, pleading, &c. either in form or substance."

Pleas in bar, may be amended to any extent, which the court in their discretion may allow: the same may be said of *pleas puis darrein continuance*.² *Brief statements of facts* are amendable.³ The same general rules apply to *replications*, and other subsequent pleadings and proceedings.

The rule for *payment of money into court*, may be amended under special circumstances; as where the suit was on different claims, and the defendant intending to pay one, paid in money on the whole declaration; instead of paying it on the count upon the particular claim.⁴

Of verdicts. Where a general verdict has been rendered upon a declaration containing several counts, one of which is bad, the plaintiff will have leave, during the same or any subsequent term, to amend the verdict, by taking it upon one or more good counts, if the judge who presided at the trial will certify, that all the counts were for only one cause of action, or that all the evidence applied to the count on which the verdict is proposed to be taken.⁵

¹ 5 Wend. Rep. 72.

² *Coffin v. Cottle*, 9 Pick. Rep. 287.

³ *Bangs v. Snow et al.* 1 Mass. Rep. 181.

⁴ *Jones v. Hoar*, 5 Pick. Rep. 285.

⁵ 32d Rule C. C. Pless. Appendix B. *Barnard v. Whiting et al.* 7 Mass. Rep. 358. *Barnes v. Hurd*, 11 Mass. Rep. 57. *Sullivan v. Holker*, 15 Mass. Rep. 374. *Patten et al. v. Gurney et al.* 17 Mass. Rep. 182. *Baker v. Sanderson*, 3 Pick. Rep. 348. *Cornwall v. Gould*, 4 Pick. Rep. 444.

A verdict, which is erroneous in omitting to find all the issues, may be amended, even after a writ of error is brought, if the judge who tried the cause will certify, that there was no question in regard to such issue.¹

A special verdict defective in substance, cannot be amended by the minutes of the judge, without the consent of both parties.²

Statement of facts. *An agreed statement of facts* cannot be amended but by consent; — if an error be committed, the only remedy is by moving the court to discharge the whole, — which, in proper cases, will be done.³

Bill of exceptions. No instance is known where a bill of exceptions has been amended, — or where any question was made as to its propriety.

Of records. By the common law, any apparent error in the record might be rectified and amended by another part of the same record. In *Atkins et al. v. Sawyer*,⁴ where in an action against an administrator, judgment was rendered against him as administrator, the court held that it might be amended, and judgment entered against the goods and estate in his hands.

All circumstantial errors, clerical mistakes, and defects in form may be amended. A *remittitur damna* may be entered by the plaintiff, after error brought, because the verdict exceeded the *ad damnum*.⁵ Where the Supreme Court, on a writ of error, had reversed a judgment of the Court of Common Pleas, and ordered a *venire facias de novo* to be tried at their own bar,

¹ *Clark v. Lamb*, 6 Pick. Rep. 512. 8 Pick. Rep. 415. S. C.

² *Walker v. Dewing et al.* 8 Pick. Rep. 520.

³ Vide *Stockbridge v. West Stockbridge*, 13 Mass. Rep. 302.

⁴ 1 Pick. Rep. 351.

⁵ Per curiam. *Hutchinson v. Crossen*, 10 Mass. Rep. 251.

it was holden, that on the new trial, they had not power to grant an amendment of the declaration, on the ground that this was the record of another court, which they were only authorized to examine, and to reverse or affirm the judgment.¹

It is said,² that the record of an inferior court, sent up on a writ of error, may be amended in the Superior Court, if the other refuseth, — and in *Wells et al. Ex'ors. v. Dench*,³ the same doctrine was holden; but in *Thatcher et al. v. Miller*,⁴ the court waived the decision of that question.

In the common case of a new trial of an action, brought by exceptions from the Common Pleas to the Supreme Court, it has never been supposed that the court had less power to grant amendments, than in actions brought up by appeal; and the decision in *Hutchinson v. Crossen*, would hardly be considered as binding now in any case.

Judicial writs. Writs of error are probably amendable to every extent, which the court may see fit to authorize. Where the plaintiff in error assigned an error in fact, and failed to prove it, he was not permitted to amend by assigning another error in fact, or restoring one which he had previously stricken out.⁵

Miscellaneous. A constable is permitted to amend his return of the *venire*, even in a capital case;⁶ so to amend the return of the warrant for summoning a town meeting.⁷ A town clerk may amend his record

¹ Per curiam. *Hutchinson v. Crossen*, 10 Mass. Rep. 251.

² Bac. Abr. tit. Amendment.

³ 1 Mass. Rep. 233.

⁴ 13 Mass. Rep. 270.

⁵ *Hathaway v. Clark*, 7 Pick. Rep. 145.

⁶ Anonymous. 1 Pick. Rep. 196. *Commonwealth v. Parker et al.* 2 Pick. Rep. 550.

⁷ *Thayer v. Stearns et al.* 1 Pick. Rep. 109–112.

of the administration of the oath, in former years, to town officers, when he was clerk, — and such amended record will be competent evidence.¹

SECT. II. AT WHAT TIME AND ON WHAT TERMS AMENDMENTS ARE GRANTED. — FORM OF AMENDMENTS, &c.

Amendments in matters of form, are granted, of course, upon motion, without costs or continuance; but if the defect be pointed out and relied on by the adverse party, on special demurrer, or plea in abatement, the court in their discretion will impose terms.²

Usually, if the party making the mistake correct it at once, when pointed out, no terms are imposed, as on a plea of misnomer, or demurrer for informal teste; — but not if he persist in trying it, or unnecessarily delay the motion.³

Even in this last case, if the error be very slight, or merely clerical, it seems no costs are imposed; as where the plaintiff in his replication, “*put himself on the country,*” instead of “*praying that it might be inquired,*” &c.⁴ or in the case of an informal *venue*.

Cases can rarely occur, where amendments in matters of form are necessary; — and if the defect be not objected to at the first term, it is cured, and need not be amended at all. Sometimes, however, it is, if not

¹ *Welles et al. v. Battelle et al.* 11 Mass. Rep. 477, 481.

² Reg. Gen. S. J. C. 8. Appendix A. 10th Rule C. C. Pleas. Appendix B.

³ *Bullard v. Nantucket Bank*, 5 Mass. Rep. 99.

⁴ *Hartwell v. Hemmenway*, 7 Pick. Rep. 117

⁵ *Munroe v. Cooper et al.* 5 Pick. Rep. 412.

absolutely necessary, very desirable, as in cases of *misnomer*, particularly of a corporation.¹

Time of amendment. There seems to be no limitation, imposed by the rules or practice of the courts, of the *time* within which amendments may be made. They are allowed, not only after issue to the country, and upon the trial, and after joinder in demurrer, but after argument of the demurrer, or after a nonsuit on account of the variance, or after judgment arrested for the insufficiency of the pleading.²

The party demurring to a pleading is usually, when the decision is against him, permitted to waive his demurrer, and to take issue on the facts. This cannot perhaps be considered as invariably allowed, but the exceptions or restrictions are not governed by any known system.

The only case, in which perhaps the court will never grant an amendment, is where there has been an issue in fact and a verdict, and the unsuccessful party wishes to substitute another issue. This probably has never been done.

Terms of amendment. The general rule upon *substantial* amendments is, that the opposite party shall have costs, or a continuance, at his election. This is called, "*the common rule.*" Originally, the common rule embraced only amendments of *declarations*. It was adopted in 1780, and it allowed the plaintiff to amend at any time before joinder in demurrer, on paying costs, or granting a

¹ *Sherman v. Prop. Conn. Riv. Bridge*, 11 Mass. Rep. 338. *Bullard v. Nantucket Bank*, 5 Mass. Rep. 99.

² *White v. Snell*, 5 Pick. Rep. 425. *Babcock v. Thompson*, 3 Pick. Rep. 446. *Hill v. Haskins et al.* 8 Pick. Rep. 83. *Williams v. Hingham Turnpike Corp.* 4 Pick. Rep. 341.

continuance, at the election of the defendant.¹ The rule has since been extended in practice, to embrace all material amendments. Upon amendments of pleas and replications, the terms imposed are frequently less strict, and the party is only required to pay the costs accruing since the amended pleadings were filed. Sometimes he is only required, not to take the costs of the term at which he amends; as where the motion is made at a term when the cause is not for trial, or before any objection has been taken on the other side. There is no invariable practice, but it depends upon the discretion or impressions, of the judge who grants it. More strict terms are seldom imposed, even on amendments after demurrer and argument.

Even on amendments of the declaration, during the trial, the court do not *always* allow the other party a continuance.

Form of amendment. After leave to amend has been granted, the party who has leave to amend, should, without delay, put the amendment in writing, and file it with the papers in the case. The amendment should be written out on a separate paper, and the writ, plea, &c. amended, should remain as before, so that the court may see what the nature of the amendment is, and its extent. There is no specific rule setting forth the *time* when the amendment shall be filed; but upon leave given to amend, the other party may, upon motion to the court, obtain a rule fixing the time, within which the amendment shall be filed: and if no time be fixed, and the party unreasonably neglect to file his amendment in sufficient season, the court will take care that the other party shall not suffer thereby, and will grant a postponement or continuance of the case,

¹ *Perkins v. Burbank*, 2 Mass. Rep. 81, 83. *Haynes et ux. v. Morgan*, 3 Mass. Rep. 208. *Tappan v. Austin*, 1 Mass. Rep. 31.

or refuse to permit the amendment to be filed, in their discretion.

SECT. III. EFFECT OF AMENDMENTS.

As to parties. By the rule of the Supreme Court,¹ where one party amends, the other shall also be entitled to amend, if his case require it. The same rule is adopted by the court of Common Pleas.²

In *Green v. Gill, Exor.*³ the court held, that where the declaration was amended, it was not of course, that the defendant should have leave to plead double, if he had before pleaded but one plea; but that if necessary to his defence, he might do so, and at any rate, he might waive his former plea, and substitute any other.

Where the declaration is amended by filing additional counts, an important question arises, as to what the plaintiff may prove under them. For instance, to a declaration on a promissory note, a count for money had and received is added, and the defendant pleads the general issue to both: if the plaintiff offer to prove money actually received by the defendant, but not connected with any note, the evidence supports the issue joined, and if it be admitted, the plaintiff recovers for a new and distinct claim, which the rule as to amendments, prohibits; if it be refused, the parties, the court, and the jury must encounter the inconvenience of trying questions, not presented by the record. If the trial is not to be governed by the issue joined, and submitted to the jury, the court must institute an inquiry, as to whether the demand offered to

¹ Reg. Gen. S. J. C. 9. Appendix A.

² Rule 11th. Appendix B.

³ 5 Mass. Rep. 379.

be proved, was intended to be embraced in the original action. This may, in ordinary cases, be easy, but in many, from the lapse of time, change of counsel, and of parties, quite impossible.

After a verdict for the plaintiff, or judgment on default, the defendant has no remedy, if new causes of action have been introduced, under the new counts, unless these counts "appear from the record," to be for new causes. It seems not enough, that they might embrace new ones, but it is necessary that it should appear, that they could not be for the same. Few cases can arise, where this conclusion could be drawn. Thus if a count for goods sold, were added to a count for money had and received, and the judgment rendered generally on both, or only on the new one, it could not be perceived but that the cause of action might be within the case stated by Parker C. J. in *Ball v. Claflin*,¹ "where the plaintiff has the right to the value, or the price of goods, which have come to the hands of the defendant in such manner, as that he is accountable on an implied or express contract for the value, or the price." The defendant may have had the goods in a mode that renders it doubtful, whether they were sold to, or converted by him; but, in either case, if he had sold them, and received the money for them, money had and received would certainly lie against him. So in the case, in which the court refuses an amendment, as where a note has been given in payment of a piece of goods sold,² the note declared on, may be of such a mixed and confused character, that it may be doubtful whether it was a note for the price, or a mere promise to pay for the goods sold, and yet this cannot appear

¹ 5 Pick. Rep. 303.

² *Tappan v. Taylor*, cited in *Vanclee v. Therasson*, 3 Pick. Rep. 13.

from the record merely. If the plaintiff, however, has mistaken the effect of the note or writing, by declaring on it, as a promissory note, he might clearly amend and set it right, by filing a count for goods sold, &c. though upon the record, it is filing a new count, for a new cause of action. There will thus be very few supposable cases, where, on inspection of the record, the court can decidedly say, that the amendment filed, was not merely the correction of a mistake, in the *form* of declaring; and by the rule as established, there is then no error.

Where a count is stricken out of a declaration, by leave of court, the declaration must be considered, as if the count had never been introduced.¹

2. *As to bail.* In *Bean v. Parker et al.*² and in *Hill v. Hunnewell*,³ it was decided, that the mere fact of entering into a rule of reference *of all demands*, in an action, discharges the bail, although it be pleaded and shewn, that no additional claim is introduced, in behalf of the plaintiff; and this, upon the ground, that a reference of all demands is, in truth, abandoning the suit altogether, and giving to each party an unlimited right to claim against the other, without regard to the original right of action. And in the case of *Bean v. Parker et al.* above cited, Parker C. J. in delivering the opinion of the court, says, “when one becomes bail for another, he is responsible only for the demand contained in the suit, upon which the principal has been arrested. Another demand cannot be substituted or added, without defeating the contract of bail.”

¹ *Prescott v. Tufts et al.* 4 Mass. Rep. 146.

² 17 Mass. Rep. 591.

³ 1 Pick. Rep. 192. *Aliter*, if the action, and only the defendant's demands against the plaintiff, be referred.

And in *Willis v. Crooker*,¹ it was holden, that the filing a new count, which appeared to be for a new cause of action, would discharge the bail.²

3. *As to other and subsequent attaching creditors.* In *Danielson et al. v. Andrews et al.*³ Wilde J. intimated, that increasing the *ad damnum*, for the purpose of giving a right to appeal, would discharge the attachment, where a subsequent one existed; and in *Willis v. Crooker*,⁴ the filing new counts for a different cause of action, was holden to vacate the attachment made on the writ, as against subsequent attaching creditors.

In *Putnam v. Hall*,⁵ the amendment of the sum directed to be attached was held to be void, as against a second attachment.

In *Ball v. Claflin*,⁶ where an amendment was made by filing new counts upon the same cause of action, Parker C. J. says, “the new count offered under leave to amend must be consistent with the former count or counts, that is, it must be of a like kind of action, subject to the same plea, and such as might have been originally joined with the others. It must be for the same cause of action, that is, the subject matter of the new count must be the same, as of the old; it must not be for an additional claim, or demand, but only a variation in the form of demanding the same thing. Amendments made conformably to the rule thus explained, can do no injury to any one. Neither the

¹ 1 Pick. Rep. 204.

² Vide *Fullam v. Valentine*, 11 Pick. Rep. 156.

³ 1 Pick. Rep. 156.

⁴ 1 Pick. Rep. 204.

⁵ 3 Pick. Rep. 445.

⁶ 5 Pick. Rep. 303. Vide also *Denny et al. v. Ward*, 3 Pick. Rep. 199.

defendant, nor his bail, nor subsequent attaching creditors, have ground of complaint, when their liability is in no degree changed or affected, except merely in regard to want of form, which our statute of *joconfails* is meant to guard against." The rule, as stated above by Parker C. J. is perfectly manifest and reasonable, but its application must be confined to the case of amendments of the declaration where no new cause of action is introduced. The authorities before cited, which are confirmed by the recent case of *Emerson v. Upton*,¹ are uniform in the doctrine, that any material amendment of the writ, such as increasing the *ad damnum*, or amending the sum directed to be attached, or correcting the date of a return upon the writ, though the error be clearly clerical only, will have the effect of discharging any attachment made upon the writ, as against subsequent attaching creditors; and in the case last cited, Parker C. J. in delivering the opinion of the court, says, "It will be found on an examination of the cases in which amendments of writs have been granted, that the effect of them, *when any change* has been made, has been limited to the parties to the suit, in which the amendment is granted."

¹ 9 Pick. Rep. 167.

CHAPTER III.

CONTINUANCE.

Continuance or *imparlance*, as it is termed in pleading, in its original sense, is when time is given to a party, to answer the action or pleading of his opponent.¹

And continuances, are of two kinds, *general* and *special*: the latter are distinguished from the former, by any reservations or restrictions, that may be appended to them.

Continuances are ordered or allowed by the court, when there is not time during the session, or term of the court, to try the cause, or for advisement by the court; and they may be granted, on motion by either party.

After a *general* continuance or *imparlance*, the defendant may plead *in bar* of the action, but not *in abatement*, or to the jurisdiction of the court.²

A *special* continuance or *imparlance*, in our practice, includes, it is presumed, the *special* and the *general special* *imparlance* in the English practice, and so is a continuance of the cause over to the next term, saving all advantages to the defendant whatsoever, in making any exception to the writ, in matters of form, or otherwise, and to the jurisdiction of the court.³

¹ Bac. Abr. Pleas, C. Com. Dig. Pleader, D.

² 2 Saund. 1. n. 2. 1 Chitty Plead. 422.

³ Ibid.

It is within the discretion of the court, whether to grant a special continuance or not.

Continuances are sometimes granted *upon terms agreed upon by the parties*, as that the defendant shall recover no costs of that term, if he prevail;— or that the judgment of the court shall be final, at the term to which it is continued;— or that the defendant shall be defaulted at the next term.

SECT. I. WHEN A CONTINUANCE MUST BE HAD.

In the Court of Common Pleas, it is provided, that in the counties of Berkshire, Franklin, Hampshire, Hampden, Worcester, Middlesex, Essex, Norfolk, Bristol, and Plymouth, neither party shall be holden to be ready for trial, at the term, in which the action is entered, unless previous notice in writing of a trial, has been given by the adverse party, *seven days* before the sitting of the court.¹ So that in these counties, either party is entitled, of course, to a continuance, unless notice has been given, according to the above rule. This notice, it will be perceived, must be *in writing*; and it must be so served, as to bring it home to the party.²

Whenever a defendant is out of the Commonwealth, at the time of the service of the writ, and does not return before the sitting of the court, at which the action is to be entered, it is made the duty of the

¹ 33d Rule C. C. Pleas. Appendix B.

² Anonymous. 1 Caines' Rep. 73. *Swartout v. Gelston*, 1 Col. Ca. 77.

plaintiff to suggest that fact upon the record, and the court will order a continuance of the action, until the next term; at the second term, if the defendant has not returned, and has had no notice of the suit, the court may order the action to be further continued, or may render judgment therein, at their discretion. The practice is, to render judgment at the second term, in all cases where the action is brought upon a liquidated demand, but in other cases, to order a second continuance.¹

Whenever a trustee is cited in a case, where the defendant is out of the Commonwealth, the statute makes it the duty of the court, to order the action to be continued two terms.²

If judgment, in either of the foregoing cases, be rendered against the defendant, contrary to the provisions of the statutes, the defendant may reverse the judgment, upon writ of error.³

An executor or administrator cannot be compelled to defend any suit, until one year from the time of taking upon himself the trust;⁴ actions, therefore, against them, with the exception of those named in the statute, must be continued, until the expiration of the year.

By *Stat. 1783. ch. 59. s. 3.* it is provided, that all executors and administrators of any estate, shall, upon motion to the court, where any suit is, or may be depending against them, in their said capacity, be enti-

¹ Stat. 1797. ch. 50. s. 5.

² Stat. 1794. ch. 65. s. 2.

³ *Blanchard v. Wild*, 1 Mass. Rep. 342.

⁴ Stat. 1788. ch. 66. s. 2.

tled to continuance of the same, until the next term of said court. This provision refers to the case of a defendant's death, pending a suit against him, and his executor or administrator coming in and defending the same.¹

Effect of continuance. Where the defendant is out of the Commonwealth, at the time of the service of the writ, the continuance, upon the suggestion of that fact, is by order of law, and is a special one. In the case of *Rathbone v. Rathbone*,² it was settled, that where a writ is sued out against a defendant, who is out of the Commonwealth, and the fact is suggested upon the record, and a continuance ordered, that a plea in abatement may be filed, upon the defendant's appearing, at the second term, notwithstanding the continuance. The same reasons, which apply to the case above cited, are equally strong in the case of a *set-off*. The statute³ requires the defendant to file his *set-off*, *seven days* before the trial; but it will be perceived, that the reason of the statute does not apply, where it appears upon the record, that the party was out of the Commonwealth at that time. Perhaps under such circumstances, the court would put the defendant to his cross-action, and continue the first, until the cross-action was determined.

¹ Vide Stat. 1783. ch. 32. s. 10.

² 4 Pick. Rep. 89.

³ Stat. 1784. ch. 28. s. 12.

SECT. II. CONTINUANCE FOR CAUSE.

It is in the power of courts generally, to grant a continuance to either party, upon good cause being shewn.

The want of material testimony, which the party has used due diligence to obtain, and which it is probable, may be procured at some future term, is a good cause for a continuance of the action.

Whenever a motion for a continuance, on this ground, is made, it must be supported by an affidavit, stating the name of the witnesses, or nature of the evidence wanted, the facts expected to be proved, with the grounds of such expectation, and the exertions which have been used, to procure the desired evidence.

If the affidavit be deficient in either of these particulars, a continuance will not be granted; and any of these circumstances, except what the witness is expected to say, may be disproved by counter affidavits.

A continuance will not be granted, if the opposite party will admit, that the absent witness would, if present, testify to the facts stated in the affidavit.¹

It must also appear that the witness has been summoned, and had his fees tendered or paid to him, where it is in the power of the party so to do.²

An engagement by the witness to attend, is usually considered as equivalent to a tender of his fees.

¹ Reg. Gen. S. J. C. 13. Appendix A. 15th Rule C. C. Pleas. Appendix B.

² 16th Rule C. C. Pleas. Appendix B.

Where the same property has been attached, at the suit of several creditors, the subsequent attaching creditors may continue their actions, until the termination of that, on which the attachment was first made.¹ Such continuances are without costs to the defendant.

And after an action has been defaulted, it is usual to allow the plaintiff to continue the action for judgment, as long as he thinks fit, at his own cost. But if objection be made by the defendant, or by any one interested, judgment must be rendered upon the default, unless good cause can be shewn.²

The court will order a continuance for judgment, where a cross action is pending, or is about to be commenced, so that there may be a *set-off* of the judgments, if due diligence have been used by the party making the application.³

A continuance will be granted to enable a party to plead specially, where the nature of the case requires it; but it will not be done, as a matter of course.⁴

If a defendant have been previously cited as trustee of the plaintiff, the action against him, will be continued, until the termination of the trustee process.⁵

Where an indictment, and a civil action, for the same cause, are pending at the same term, it is usual to continue one of them.⁶

¹ *Barnard v. Fisher*, 7 Mass. Rep. 71.

² *Coolidge et al. v. Cary*, 14 Mass. Rep. 115.

³ *Winthrop v. Carlton*, 8 Mass. Rep. 456.

⁴ *Craigie v. Mellen et al.* 4 Mass. Rep. 587.

⁵ *Winthrop v. Carlton*, 8 Mass. Rep. 456. *Foster v. Jones*, 15 Mass. Rep. 185.

⁶ *Commonwealth v. Bliss*, 1 Mass. Rep. 32.

SECT. III. HOW AND WHEN CONTINUANCES ARE
TO BE APPLIED FOR.

How. Continuances are applied for, by motion to the court. The motion, though, strictly speaking, it should be in writing, is generally made by parol. If granted, the fact is merely minuted on the docket, by the clerk.

Where a continuance of any suit, or upon any terms, is agreed upon by the parties, no motion to the court is necessary. The clerk, on application to him, and on being furnished with satisfactory evidence of the agreement, will make the proper entry upon the docket.

Where a continuance is made necessary by law, as when the defendant was absent from the Commonwealth, at the time of the service of the writ, — or dies during the pendency of the suit, — the plaintiff generally suggests the fact which makes the continuance necessary, verbally to the court, and upon that suggestion, the continuance is ordered, and minuted on the docket.

Where a continuance is moved, for cause, though the motion be not in writing, yet we have seen that the facts upon which the motion is grounded, must be verified by affidavit.¹

When. A motion for continuance, should be made, as soon as possible after the sitting of the court, or after the cause which occasions the necessity of it, is known to exist. The rule of the Supreme Court,

¹ Vide ante page 211, 396.

requires that the motion should be made on the first day of the term,¹ when the necessity for it is known, — except in Suffolk, where it may be made within the first four days,² — upon the penalty of the party moving for it, recovering no costs for that term; and in general, where a party is guilty of any negligence in making such motion, the other party ought not to be allowed to suffer by it.

When an action is continued at the motion of either party, at the term it might have been tried, the party making the motion, must pay the opposite party, all his expense in procuring the attendance of his witnesses, if the cause for continuance were known before, unless notice of such motion were given, in season to prevent the summoning of the witnesses, or unless the opposite party was guilty of some misconduct, or took some undue advantage, which renders a continuance necessary.³ And the court may impose other terms, if the justice of the case require it.⁴

Where an action is continued by order of court, for advisement, care will be taken that neither party suffer by the delay; and if a party die during such continuance, judgment will be entered as of the preceding term, *nunc pro tunc*.⁵

So if a trustee die in such case, he may be charged, and judgment entered against him, as of a preceding term, where the cause was continued for advisement, or the trustee had refused further to disclose.⁶

¹ Reg. Gen. S. J. C. 19. Appendix A.

² Reg. Gen. S. J. C. 20. Appendix A.

³ Reg. Gen. S. J. C. 14. Appendix A.

⁴ Reg. Gen. S. J. C. 15. Appendix A.

⁵ 1 Binn. Rep. 172. *Perry v. Wilson*, 7 Mass. Rep. 393.

⁶ *Patterson et al. v. Buckminster & Tr.* 14 Mass. Rep. 144.

If a cause be removed into the Supreme Court by appeal, and the court refuse to take cognizance of it, the suit is not thereby discontinued in the court below, but that court may order continuances to be entered, and proceed to final judgment.¹

¹ *Commonwealth v. Moore*, 3 Pick. Rep. 194.

CHAPTER IV.

PAYING MONEY INTO COURT.

When the dispute is, not whether any thing is due to the plaintiff, but how much, the defendant, before he pleads, is at liberty to move the court, in writing,¹ for leave to pay so much money into court, as he thinks is really due. This motion is granted of course, and an order is passed, the effect of which is, that if the plaintiff elect to take the sum brought in, as in full satisfaction of his suit, his costs are paid to him, and the action is dismissed. If the plaintiff refuse to receive the money, in full satisfaction, he is still entitled to take it out of court, giving a receipt therefor, to the clerk.²

The practice of bringing money into court upon motion, was first introduced, in order to avoid the hazard and difficulty of a plea of tender.³ It is generally

¹ The following is a form of such motion :

No.	ss. }	C. C. Pleas, Jan. T. 1834. John Doe v. Richard Roe.
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And now the said Richard Roe, by his attorney, moves for leave to bring in the sum of *dollars*, and that, unless the plaintiff accept the same, in full discharge of the damages claimed against him the said Richard Roe, the sum so brought in, may be paid out of court to the plaintiff or his attorney, and the amount thereof be stricken out of the declaration, and no evidence thereof be given at the trial: and that if the plaintiff shall elect to receive said sum, in full discharge of the damages claimed by him, he may be ordered to tax his costs, that the defendant may pay the same.

A. B. *Defd's Att'y.*

² 2 Arch. Pract. 203.

³ *White v. Woodhouse*, 2 Stra. Rep. 787.

made before plea, though it can be made, at any time before judgment, by special leave of court :¹ and even after a regular judgment, and new trial granted, the defendant has had leave to bring money into court.²

Cases in which money may be paid into court. As to the cases in which money may be brought into court, the general rule is, that it may be done in all actions brought upon a contract, where the sum demanded is either certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury.³ Thus, it is allowed in *assumpsit*, where the breach is non-payment of money,⁴ but not otherwise.⁵ But it is not allowed against *bailees* or *carriers* of goods, in actions of *assumpsit* relating to their *carriage* or *delivery*,⁶ with this exception, that where a carrier has given notice, that he will not be accountable for goods beyond a certain amount, he will be permitted to pay that sum into court.⁷

In an action on a policy of insurance, money may be brought into court ;⁸ so in *ejectment* for non-payment of rent ;⁹ so in *replevin* and *avowry* for rent,¹⁰ money may be brought into court.

In trespass *quare clausum fregit*, when the defend-

¹ *Griffiths v. Williams*, 1 Term. Rep. 710. *Dunlap v. Com. Ins. Co.* 1 Johns. Rep. 149.

² 1 Tidd's Pract. 542.

³ 2 Arch. Pract. 199. *Hallet et al. v. East India Company*, 2 Burr. Rep. 1120.

⁴ 2 Salk. 596.

⁵ *Strong v. Simpson*, 3 Bos. & Pul. Rep. 14.

⁶ *Fail v. Pickford*, 2 Bos. & Pul. Rep. 234.

⁷ *Hutton v. Bolton*, 1 H. Black. Rep. 299. note b.

⁸ 1 Sell. Pract. 280.

⁹ *Downes v. Turner*, cited 2 Salk. 596.

¹⁰ *Ibid.*

ant shall disclaim, and the trespass was involuntary, the defendant may bring money into court, to satisfy the damage.¹

In *trover*, where the action is for money, and not for the value of a thing, it may be brought into court;² but, generally, *trover* being an action for damages, in which the amount to be recovered must depend upon the jury, the motion cannot be made.³ And in *Fisher v. Prince*,⁴ Lord Mansfield and Wilmot J. concurred in the following distinction: "that where trover is brought for a *specific chattel*, of an *ascertained* quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its *real* and *ascertained value* must be the *sole measure* of the damages, there the specific thing demanded, *may* be brought into court." Lord Mansfield said, "it is a pity that a false conceit should, in judicature, be repeated as an argument; 'the court does not keep a warehouse,' what then? What has a warehouse to do with ordering the thing to be delivered to the plaintiff?"

Motions to bring in or to deliver specific articles, in actions of trover, ought neither to be refused or granted, of course; they must depend upon their own circumstances.⁵

The doctrines laid down by the court, in the case last cited, bear with peculiar force upon some cases which may arise under the action of trover, and in which it is probable that they would be applied. As in tro-

¹ Stat. 1786. ch. 52. s. 2.

² *Anonymous*, 1 Stra. Rep. 142.

³ *Olivant v. Berino*, 1 Wils. Rep. 23.

⁴ 3 Burr. Rep. 1363.

⁵ *Ibid.*

ver for a bond, the defendant may have detained it, so as to be unable to make a defence to the action, yet the bond may be valueless to him, and at the same time possess a real and ascertained value to the plaintiff; in such a case there seems to be no reason, why the defendant may not surrender it in court under a rule, and upon the payment of costs, have the action dismissed.

In *debt* for rent, the defendant may bring money into court;¹ and so in actions for *debt* generally, when founded upon a contract; but in those actions of debt, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a certain sum by way of penalty, the defendant cannot bring money into court, though he may move to stay proceedings, upon payment of the penalty and costs.²

In *covenant* for non-payment of money, the defendant may pay money into court.³

In actions of *trespass* or other *tort*, as in an action against a sheriff for a false return, money cannot be paid into court.⁴

There is said to be no precedent, where there are several defendants, for one to pay money into court.⁵

Effect of paying money into court. By paying money into court, upon the common rule, the defendant acknowledges his liability to the action, and to the recovery by the plaintiff, of so much as is paid in by the defendant.⁶

¹ 1 Tidd's Pract. 538.

² 2 Arch. Pract. 199. Vide 2 Stra. Rep. 890.

³ Ibid.

⁴ *White v. Woodhouse*, 2 Stra. Rep. 787. *Squire v. Archer*, 2 Stra. Rep. 906.

⁵ Vide 2 Black Rep. 1030.

⁶ *Burrough v. Skinner*, 5 Burr. Rep. 2639. *Cox et al. v. Parry*, 1 Term. Rep. 464.

Payment of money into court generally on the whole declaration, admits the contract as stated in each count, and a breach of it, and that something is due on each count thereof; but it does not admit the amount of the breach there stated.¹ If, however, there be several counts in the declaration, one of which only is applicable to the plaintiff's demand, payment of money into court generally, admits a cause of action on that count only.²

If a special agreement be declared on, it admits the existence of it;³ but if the declaration contain the *common counts*, it may be paid in upon them, and leave the plaintiff to prove his special ones.⁴ Accordingly, where the action is upon a bill of exchange, and money is paid in, there is no necessity of proving the handwriting of the defendant;⁵ so in an action of covenant, the execution of the deed is admitted,⁶ though it is not such an admission as precludes the defendant from objecting to the legality of the contract, in order to prevent the plaintiff from recovering beyond the sum paid in.⁷ If the declaration contain counts upon both illegal and legal demands, the money paid in, shall be applied to the legal demand only.⁸ So, in an action on a policy of insurance, the court, under particular circumstances, allowed the defendant to give evidence of fraud, notwithstanding the payment of

¹ *Stoveld v. Brewin et al.* 2 Barn. & Ald. Rep. 117.

² *Stafford et al. v. Clark*, 2 Bing. Rep. 377.

³ *Yate v. Willan*, 2 East. Rep. 128.

⁴ 1 Sell. Pract. 287. 2 Arch. Pract. 202.

⁵ *Gutteridge v. Smith*, 2 H. Black. Rep. 374. *Israel v. Benjamin*, 3 Camp. Rep. 40.

⁶ *Randall v. Lynch*, 2 Camp. Rep. 357.

⁷ *Cox et al. v. Parry*, 1 Term. Rep. 464.

⁸ *Ribbans v. Crickett et al.* 1 Bos. & Pul. Rep. 264.

money into court.¹ It is, however, a conclusive admission of the plaintiff's right to sue,² and of his right to the character in which he sues.³ But as it is no admission of the plaintiff's right of action, beyond the sum paid into court,⁴ it does not deprive the defendant of the benefit of the statute of limitations, as to the residue of the plaintiff's demand.⁵

When money is paid into court, it is a payment *pro tanto*; the defendant cannot, and the plaintiff must, take it out; and if the defendant die, and the action be revived, or a new one be brought, such payment may be given in evidence in the second action.⁶

If the plaintiff, after money has been paid into court, proceed in his action, it is at his peril. The sum paid in, must be considered as stricken out of the declaration; it is for so much, a defence, and unless the plaintiff prove a sum to be due, beyond what is paid, the verdict should be for the defendant.⁷ If, however, more appears to be due to the plaintiff, he is entitled to a verdict, for the overplus and costs.⁸

The plaintiff stands in much the same situation, as regards the residue of his demand, as he would have done, if the defendant had never acquiesced in any part of it; he may, therefore, be nonsuited,⁹ or there

¹ *Muller v. Hartshorne*, 3 Bos. & Pull. 556.

² *Miller v. Williams*, 5 Esp. Rep. 19.

³ *Lipscombe v. Holmes*, 2 Camp. Rep. 441.

⁴ 2 Arch. Pract. 202. and cases cited.

⁵ *Long v. Greville*, 4 D. & R. Rep. 632.

⁶ 2 Paine & Duer. Pract. 161.

⁷ *Stevenson v. Yorke*, 4 Term. Rep. 10.

⁸ 2 Paine & Duer. Pract. 161.

⁹ *Stevenson v. Yorke*, 4 Term. Rep. 10. *Burstall v. Horner*, 7 Term. Rep. 372. *Elliot v. Callow*, 2 Salk. 597. *Stodhart v. Johnson*, 3 Term. Rep. 657.

may be a judgment as in case of nonsuit, or a demurrer to evidence, or a plea *puis darrien continuance*; in short, the cause goes on, substantially, in the same manner, as if the money had not been paid in at all.¹ The plaintiff is entitled, at all events, to the money brought in, whether he proceed in his action or not, or though he be nonsuited, or have a verdict against him. And it cannot afterwards be recovered back, though it should appear, that the defendant paid in the same wrongfully,² unless, perhaps, some fraud or deceit were practised upon him.³

A *tender*, upon which money is paid into court, admits the contract as set forth in the declaration, as in other cases. And where a tender is pleaded, and the money brought into court, the proceedings are substantially the same as under the common rule, except that the defendant, if the money be accepted, pays no costs.

But the defendant cannot recover back the money, though the plaintiff, in his replication, deny the tender, or the defendant obtain a verdict.⁴ In case of a plea of tender, the money must be brought into court, otherwise it may be treated as a nullity, and in case of a verdict for the defendant, the plaintiff may have judgment, *non obstante veredicto*.⁵

Costs. When money is brought into court, the plaintiff either accepts it with costs, in discharge of the suit, or proceeds in the action: if he elect the

¹ *Gutteridge v. Smith*, 2 H. Black. Rep. 374.

² *Malcolm et al. v. Fullarton*, 2 Term. Rep. 645. *Vaughan v. Barnes*, 2 Bos. & Pul. Rep. 392.

³ *Cox v. Brain*, 3 Taunt. Rep. 95.

⁴ *Le Grew v. Cooke*, 1 Bos. & Pul. Rep. 332. *Cox v. Robinson*, 2 Stra. Rep. 1027.

⁵ *Claflin v. Hawes*, 8 Mass. Rep. 261.

former course, he notifies the defendant of his intention, and if the costs remain unpaid, he has a right to proceed, and will recover his costs, with nominal damages.¹

But if the plaintiff do not elect to take the money, but proceeds to trial, unless he prove a sum to be due beyond what is paid into court, the defendant, as before stated, is entitled to a verdict, and will recover the costs of the action, from the time the money was paid into court, but not before, and the plaintiff recovers no costs.²

If the plaintiff recover more than the sum paid in, he is entitled to his costs, in the same manner, as if there had been no payment.³

The plaintiff is entitled to costs up to the time of the defendant's paying money into court, if he take it out at any time before trial, even if he proceed in the cause, and though he afterwards gives notice of trial, which he neglects to countermand, whereby the defendant is entitled to judgment, as in case of nonsuit;⁴ but not if the defendant have obtained such judgment; in which case, the subsequent costs are to be allowed to the defendant.⁵

In actions on policies of insurance, where there is a consolidation rule, and money is paid into court, it seems that the plaintiff is entitled to the whole costs of the causes not tried, up to the time when the money

¹ *Bucker et al. v. Palsgrave*, 1 Camp. Rep. 557.

² Reg. Gen. S. J. C. 17. Appendix A. 20th Rule C. C. Pleas. Appendix B.

³ 2 Paine & Duer. Pract. 164. 1 Saund. 33, note 2. *Stevenson v. Yorke*, 4 Term. Rep. 10. *Postle v. Beckington*, 6 Taunt. Rep. 158. 1 Marsh. Rep. 510. S. C.

⁴ *Seamour v. Bridge*, 8 Term. Rep. 408. *Lorck v. Wright*, 8 Term. Rep. 486.

⁵ *Crosby et al. v. Olorenshaw*, 2 Maule & S. Rep. 335.

is paid into court, although he may not succeed in the cause, and although the defendant in that cause be entitled to the whole costs.¹

Where the conduct of the plaintiff appeared to have been extremely oppressive, and the defendant offered, and was willing to pay the money, before action brought, the court, upon motion of the defendant, discharged so much of the rule as related to the payment of costs;² and in a recent case, they allowed the defendant his costs, from the time he made the offer, to be deducted from the costs incurred by the plaintiff up to that time.³

But, in our practice, the rule being clear, and defined by the court, they would not probably exercise their discretion in such a case, to the infringement of the rule itself.

¹ 1 Tidd's Pract. 547. *Twemlow v. Brock*, 2 Taunt. Rep. 361. Vide *Burstall v. Horner*, 7 Term. Rep. 372.

² *Johnson v. Houlditch*, 1 Burr. Rep. 578.

³ *James v. Raggett*, 2 Barn. & Ald. Rep. 776.

CHAPTER V.

BILL OF PARTICULARS.

In what cases it may be required. In all actions in which the plaintiff declares generally, without specifying the particulars of his cause of action, the court, upon application, will order him to give the defendant, the particulars of his claim, in writing, before the latter shall be compelled to plead. Thus, in actions for work and labor, goods sold, money had and received, and the like, the defendant may call upon the plaintiff, for the particulars of his demand.¹ So in an action of debt upon a bond conditioned for the performance of covenants, or to indemnify, or the like, the defendant may call for a particular of the breaches, for which he is sued;² and in an action, where it was alleged in the declaration, that the abstract of title delivered, was “insufficient, defective, and objectionable,” the court obliged the plaintiff, to give a particular of all objections to the abstract, arising upon matters of fact.³ So in an action by a vendee, to recover back his deposit, because the conditions of the sale had not been complied with, the defendant is entitled to the particulars of the ground, on which the plaintiff seeks to recover.⁴

This mode of obtaining from the plaintiff, a knowl-

¹ 2 Arch. Pract. 221.

² 1 Tidd's Pract. 508.

³ *Collet v. Thompson*, 3 Bos. & Pul. Rep. 246.

⁴ *Squire v. Todd et al.* 1 Camp. Rep. 293.

edge of the particular grounds of his action, is of recent practice, and has its origin in the departure from the ancient method of declaring, a more general mode of stating the plaintiff's case being now introduced. From the cases already enumerated, it will be perceived, that a bill of particulars may be called for, in other cases, than those which arise upon the *common counts*, as they are called, the rule being general, that where the declaration does not distinctly disclose the particulars of the plaintiff's demand, the defendant is entitled to call upon him for a bill of particulars.¹ But whenever the particulars of the demand are disclosed in the declaration, as in *special assumpsits*, *covenant*, or *debt* on articles of agreement, or in actions on *matters of record*, an order for such particulars, does not seem to be requisite.²

The defendant, if he have any doubt as to the lands for which *ejectment* is brought, may take out a summons before a judge,—or, according to our practice, may move to the same effect,—calling upon the plaintiff, to give him a bill of particulars.³ Also, where the ejectment is brought for a forfeiture, the court, upon application, will rule the lessor of the plaintiff, to give the defendant a particular of the covenants, and breaches, &c. on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial, of any thing not contained in those particulars.⁴ So a bill of particulars is admissible in *real actions*, as in ejectment.⁵

¹ 1 Tidd's Pract. 508.

² 1 Tidd's Pract. 508, 509.

³ *Goodright d. Balch v. Rich et al.* 7 Term. Rep. 327, 332.

⁴ *Doe d. Birch v. Philips* 6 Term. Rep. 597.

⁵ *Vischer v. Conant*, 4 Cowen. Rep. 396.

In actions for *torts*, the injury complained of is generally stated in the declaration, and, therefore, in such actions, it is not usual to make an order for particulars; but there may be cases, where the party is entitled to particulars of the wrong complained of.¹ Thus in an action against a marshal for an escape, it was holden, that he was entitled to a particular of the cause of action, for which the plaintiff sued, stating the time and particulars of the escape, as precisely as possible.²

In like manner, as the defendant may call upon the plaintiff for the particulars of his demand, the plaintiff may call upon the defendant for the particulars of his *set-off*;³ and, in practice, the same rules apply equally to both cases.

Time of obtaining it. No particular *time* seems to have been specified, within which a bill of particulars must be called for. The court, however, would, undoubtedly, hold a party to call for it within a reasonable time.

Mode of obtaining it. The bill of particulars is obtained by motion, which should be in writing, or it may be done, by an entry to that effect on the docket; and the order of the court will be upon the docket, which, if so moved for, will state the time, within which the bill must be furnished. This will be handed to the clerk when furnished, and he will place it among the papers of the case. In case the plaintiff or defendant fail to comply with the order, he will become nonsuited or defaulted upon motion.

According to the English practice, if the plaintiff

¹ 1 Tidd's Pract. 509.

² *Webster v. Jones*, 7 D. & R. Rep. 774.

³ 1 Tidd's Pract. 509.

neglect to deliver the particulars of his demand, the only consequence is, that he cannot, in the mean time, proceed in his action.¹ In *New York*, the practice is different; there, after an absolute order for a bill, the court, on motion, will grant a rule, that the plaintiff furnish to the defendant, the particulars of his demand, and pay the costs of the motion, or that a judgment of *non-pros* be entered. Furnishing a bill of particulars, after a regular notice of a motion for judgment of *non-pros*, for not delivering one pursuant to the judge's order, is an answer to the application, upon payment of costs to that time, but not otherwise.²

The plaintiff may contest the right of the defendant, to the bill, either at the time of making the motion, or afterwards; and if on a hearing, the court decide that he has no right to demand it, the previous order becomes of course annulled. But so long as the order remains upon the docket, though improvidently made, or not in due form, it is effectual to stay proceedings, so that no trial can be had, until it is complied with, or set aside upon motion, or revoked or altered by the court.³

In answer to a request by the defendant's attorney, for a bill of particulars, the plaintiff's attorney wrote to him, that the claim was on the note specified in the declaration, and no order for a bill was obtained; it was holden, that the plaintiff, on the trial, was bound by the letter, as a bill of particulars.⁴

What a bill of particulars must contain. A bill of particulars should give as much information as a

¹ 2 Arch. Pract. 222.

² 2 Paine & Duer. Pract. 151.

³ *Derry v. Lloyd*, 1 Chitt. Rep. 724. *Roosevelt v. Gardinier*, 2 Cowen. Rep. 463.

⁴ *Williams v. Allen*, 7 Cowen. Rep. 316.

special declaration, for which it is in fact a substitute, although without its form; and as an insufficient declaration is a proper ground of nonsuit, so is an insufficient bill of particulars.¹

In general, if the plaintiff's particular convey the requisite information to the defendant, however inaccurately drawn up, it is sufficient.² And if a bill of particulars state the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right, which results to the plaintiff out of that transaction.³ It should state the *items* of the demand, and when, and in what manner, they arose; but it need not state the credits or payments made by the defendant.⁴ A particular referring to an account rendered, is sufficient.⁵

The *date* of the items should always be given in the bill, with as much particularity as possible; if the plaintiff cannot state the precise day, he should give the month or year; and this is a matter, in relation to which, the judge who grants the order, must exercise a sound discretion, under all the circumstances of the case.⁶ Where the action is for a balance due upon an account current, the particular should state the *credit*, as well as the *debit* side of the account;⁷ and stating the debtor side only, or delivering a bill as general as the declaration, would be considered a contempt,

¹ *Babcock v. Thompson*, 3 Pick. Rep. 446, 448.

² *Hurst v. Watkins*, 1 Camp. Rep. 69. note.

³ *Brown v. Hodgson*, 4 Taunt. Rep. 189.

⁴ *Brown v. Watts*, 1 Taunt. Rep. 353. *Ryckman v. Haight*, 15 Johns. Rep. 222. But see *Mitchell v. Wright*, 1 Esp. Rep. 280.

⁵ *Goodrich v. James*, 1 Wend. Rep. 289.

⁶ *Humphrey et al. v. Cottleyou*, 4 Cowen. Rep. 54.

⁷ *Mitchell v. Wright*, 1 Esp. Rep. 280.

and render the attorney liable to the payment of costs.¹

In all cases where an insufficient bill of particulars is delivered, the defendant may move for further particulars;² but he cannot treat the first bill as a nullity, and afterwards move to set aside the plaintiff's proceedings for not furnishing a sufficient bill.³

The bill having been served, the plaintiff is at liberty to proceed in his action, the terms of the order being thereby complied with; but where the first bill was insufficient, the defendant has the same time to plead, after the order for a second bill, as after the first order.⁴

Effect of a bill of particulars. After the bill of particulars is furnished, the plaintiff cannot, upon trial of the action, contradict it, or give evidence of any demand not contained in it, unless specially declared upon in some count of the declaration. The bill, in fact, becomes a part of the declaration; as, where the bill of particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, the plaintiff was not allowed at the trial, to give evidence of goods sold by the defendant, as agent for the plaintiff;⁵ — so, where the particular was of a promissory note only, and when the note was produced at the trial, it was found to be written on an improper stamp, the court held that the plaintiff was precluded from resorting to his money counts.⁶ But under such par-

¹ *Adlington v. Adlington*, 2 Camp. Rep. 410.

² *Humphrey et al. v. Cottleyou*, 4 Cowen. Rep. 54.

³ *Goodrich v. James*, 1 Wend. Rep. 289.

⁴ *Mulholand v. Van Fine*, 8 Cowen. Rep. 132.

⁵ *Holland v. Hopkins*, 2 Bos. & Pul. Rep. 243.

⁶ *Wade v. Beasley*, 4 Esp. Rep. 7.

ticular, after proving the due execution of the note, the plaintiff may recover interest upon it.¹

Where the plaintiff's particular stated various sums of money due by the defendant, but some of which were in fact owing from the defendant and his partner, and not from the defendant alone, and the defendant pleaded the non-joinder in abatement, the plaintiff was not allowed to give evidence of those due from the defendant solely, because they were not distinguished from others, in the bill of particulars.²

But where one of the several joint debtors is sued alone, he must plead the non-joinder in abatement, and cannot take advantage of it upon trial; and if he plead in bar, the bill of particulars may run against him alone, without mentioning his co-debtors.³

The object of this strictness is, to prevent the opposite party from being deceived or misled, as to the demands, which the plaintiff may attempt to prove against him, at the trial, and that the defendant may be prepared to meet the subject matters of the action against him. A mistake, therefore, not calculated to deceive or mislead him, will not be deemed material.⁴ Thus, in the case last cited, where a mistake was made in the date of one of the items;—so, where a payment was made on account of the defendant to A, which was stated in the particular to have been made to B, Lord Ellenborough said he should hold it to be immaterial, unless the defendant would make affidavit,

¹ *Blake v. Lawrence*, 4 Esp. Rep. 147.

² *Colson et al. v. Jelby*, 1 Esp. Rep. 452.

³ *Gay v. Gay*, 9 Cowen. Rep. 44.

⁴ *Milwood v. Walter*, 2 Taunt. Rep. 224.

that he was misled by the particular.¹ In like manner where in debt for rent, the plaintiff in his particular, described the premises as being in a different parish from that in which they really were, the court held the mistake to be immaterial, as the defendant could not have been misled by it.² So a variance between the amount of rent demanded, in the bill of particulars, and that proved to be due, was holden not to be material.³

But it is otherwise where the variance is material, or calculated to mislead; thus it was holden, that evidence could not be given of work done in *one year*, where the date in the bill was the *first of April* in the *next year*.⁴

Although the plaintiff is confined in his proof, to the items contained in his bill of particulars, yet if it appear from the defendant's own shewing, that the plaintiff is entitled to recover for items not included in the bill, he shall recover for such items.⁵ So where the plaintiff declared upon three bills of exchange, but sought by his particular, to recover on the bill set out in the first count only, it was holden, that he might give the other bills in evidence, to prove a collateral matter, namely, the partnership of the defendants.⁶

A bill of particulars is amendable like a declaration;⁷ and these amendments are entirely in the dis-

¹ *Day et al. v. Bower*, 1 Camp. Rep. 69. note.

² *Davies v. Edwards*, 3 Maule & S. Rep. 380.

³ *Tenny d. Gibbs et al. v. Moody*, 3 Bing. Rep. 3.

⁴ 2 Paine & Duer. Pract. 154.

⁵ *Hurst v. Watkins*, 1 Camp. Rep. 68. *Williams v. Allen*, 7 Cowen. Rep. 316.

⁶ *Duncan v. Hill et al.* 2 B. & B. Rep. 682.

⁷ *Babcock v. Thompson*, 3 Pick. Rep. 446.

cretion of the court, and will be allowed, as in other cases, where the so doing will further the ends of justice.¹ And the plaintiff has been allowed to amend his particular, after having been nonsuited, and to go to a new trial.² An insufficiency of a particular, in any respect in which it might have been rectified, if the objection had been made earlier, cannot be objected to on the trial.³

¹ *Spaul v. Veeder*, 4 Cowen. Rep. 503.

² *Holland v. Hopkins*, 2 Bos. & Pul. Rep. 245. *Babcock v. Thompson*, 3 Pick. Rep. 446.

³ *Lovelock v. Cheveley*, 1 Holt. N. P. Rep. 552.

CHAPTER VI.

OYER.

When oyer may be had. In actions upon instruments under seal, as a bond, or deed of conveyance, and in pleading, where the party defends by virtue of any instrument under seal, it is generally necessary, in the declaration, or plea, to make a *profert* of the instrument,¹ or to allege an excuse for omitting to do so ;² and in all cases where such *profert* is necessarily made, the other party may have *oyer*.³

Unless there have been a *profert*, however, *oyer* can not be prayed; and, therefore, if a deed be pleaded without a *profert*, the other party should demur specially for the want of it, if it be essential to his case, that the deed should be set forth.⁴

If *profert* of an instrument under seal be made unnecessarily, the court will not grant *oyer*.⁵ But though *oyer* be not in strictness demandable, yet, if it be given, the party demanding it has a right to the use of it.⁶

When and how it may be claimed. By the 22d Rule of the Court of Common Pleas, *oyer* of all deeds

¹ 1 Sell. Pract. 261.

² *Read v. Brookman*, 3 Term. Rep. 151. *Powers et al v. Ware*, 2 Pick. Rep. 451. 1 Chitt. Plead. 415.

³ *Roberts v. Arthur*, 2 Salk. 497. 1 Tidd's Pract. 499. *Grovenor v. Soame*, 6 Mod. Rep. 122.

⁴ 2 Arch. Pract. 216.

⁵ *Morris' Case*. 2 Salk. 497.

⁶ *Jefferey v. White*, Dougl. Rep. 476.

declared on, may be had on motion, if made at the return term, but not afterwards, unless by special order of the court.¹ In the Supreme Court; there is no particular rule on the subject; but *oyer* is always demanded, upon motion to the court, which should properly be in writing. An entry of the motion, and also of the order which the court may pass upon the same, is made under the action upon the docket.

Mode of proceeding, if refused or granted. The judgment of the court upon the demand of *oyer* is, either that the party demanding it, have *oyer*, — or that he plead without it.² Upon the latter judgment, the demandant may bring a writ of error; for to deny *oyer*, when it should be granted, is error; but not *e converso*.

If *oyer* be granted, the rule in the English practice is, for the party of whom it is demanded, to make out a copy of the instrument, of which *oyer* is demanded, and carry it to the opposite party, who must pay for the copy.³ Whether this rule would be adopted here, seems to be doubtful. The more correct proceeding here would seem to be, since the prayer of *oyer* is addressed to the court, for the party of whom it is demanded, to surrender the deed into the hands of the clerk of the court, who will prepare a copy, and the party, demanding *oyer*, will be entitled to it, by paying to the clerk the fees of copying. For when a deed is declared on, or pleaded with a *profert*, it is, by intendment of law, in the actual possession of the

¹ Appendix B.

² 2 Lev. 142. 1 Saund. 9 b. 2 Saund. 46 b. note 7.

³ 1 Sell. Pract. 264. 2 Arch. Pract. 217.

court, and a copy would, therefore, most properly come from the clerk.¹

At what time oyer must be granted. The plaintiff is not bound according to the English practice, to grant *oyer* within any limited time after it has been demanded;² but it is for his interest to grant it without delay, the defendant being entitled to as many days for pleading, after *oyer* has been given, as he had when he demanded it.³ But if the plaintiff demand *oyer* of the defendant, the latter must grant it within *two days*, exclusive of that on which it is demanded, *Sunday* not being reckoned, if it be the last of the two; otherwise, in our practice, the defendant will be defaulted.⁴

Effect of oyer in various cases, — and duty of party claiming it. If there be a variance between the declaration and the *oyer*, the defendant may demur specially on that ground; but he cannot take advantage of it at the trial.⁵ But of a variance between the deed and *oyer*, or between the deed and declaration, he may take advantage, under the plea of *non est factum*.⁶ And if an imperfect *oyer* be given, the defect is cured by pleading over. A small variance between the *oyer* of a bond and a declaration, is not regarded; as where in the *oyer*, the words were, “*or delay*,” and in the declaration they

¹ Vide Vin. Abr. tit. Faits. M. a. 12.

² 2 Arch. Pract. 217.

³ *Webber v. Austin*, 8 Term. Rep. 356. 1 Arch. Pract. 130.

⁴ 2 Arch. Pract. 217.

⁵ *James v. Walruth*, 8 Johns. Rep. 410.

⁶ *Waugh & ux. v. Bussell*, 5 Taunt. Rep. 707. *Howell v. Richards*, 11 East. Rep. 633. *Goldie v. Shuttlesworth*, 1 Camp. Rep. 70.

were, "*or other delay*," the variance was held to be immaterial.¹

After *oyer* is granted, it is optional with the party, whether to set it forth in his plea or not.² But if he undertake to set it forth, and do not set it forth correctly, or omit to set forth the whole deed, the plaintiff may either sign judgment as for want of a plea, or he may pray that the deed be enrolled and demur.³ But this must be understood as extending to cases only, where the whole deed relates to the matter of action; for if it contain other matters besides those which are to be performed by the party craving *oyer*, it seems to be unnecessary to set out the irrelevant matter, but it is sufficient for him to set out *verbatim*, the whole of the matters which relate to the case in issue.⁴

The party praying *oyer* of a deed, may afterwards omit to set it forth in his plea, and may plead the general issue, or any other plea to the merits, as if *oyer* had not been prayed.⁵

If the party craving *oyer* of a deed, do not afterwards set it forth in his plea, the other party, in his replication, &c. may, if he wish to have it set out, pray that the deed be enrolled, and then set it forth, or, at least, such parts of it, as relate to the matter in dispute.⁶

Praying *oyer* of a bond, does not entitle the party

¹ *Henry v. Brown*, 19 Johns. Rep. 49.

² *Weaver's Company, q. t. v. Forrest et al.* 2 Stra. Rep. 1241.

³ *Wallace v. Cumberland*, 4 Term. Rep. 370.. Com. Dig. tit. Pleader, P. 1.

⁴ *Ibid.* 1 Saund. 317. note 2. 2 Arch. Pract. 218.

⁵ *Weaver's Company, q. t. v. Forrest et al.* 2 Stra. Rep. 1241.

⁶ Com. Dig. tit. Pleader, P. 1.

to *oyer* of the condition, unless he prayed for that likewise; for they are considered as distinct instruments.¹

The want of *oyer* of the condition of a bond, is fatal in a plea of performance,² since the court can take no notice of the condition, unless the same be spread upon the record by *oyer*.

Inspection of instruments not under seal. As a party is not entitled to *oyer* of an instrument declared upon, which is not under seal, there was formerly no mode by which the plaintiff could be compelled to produce it, until the time of trial. A statute of the United States,³ gives to their courts, the power to compel the production of books and papers, or in case of refusal, to order a nonsuit or default. No such power resides in our courts. But courts of common law will not compel the defendant to plead, until a copy of the instrument, upon which the action is founded, has been delivered to him.

According to the present practice, courts will, upon motion, order a copy of the instrument, on which the action is founded, whether it be a policy of insurance, bill of exchange, promissory note, or other special undertaking, whether alleged, or not, to be in writing, to be delivered to the other party or to his attorney. The rule laid down by Lord Mansfield is, that whenever the defendant would be entitled to a discovery in equity, he should have it, in a court of law.⁴

¹ *Jevens v. Harridge*, 1 Saund. 9 b. note 1.

² *United States v. Arthur et al.* 5 Cranch. Rep. 257.

³ Stat. U. S. 1789. ch. 20. s. 15.

⁴ 2 Stark. Ev. 731. and the cases cited.

So where the defendant has in his possession a paper essential to the plaintiff's case, an inspection of the same has been granted by the court; as in the case of an indenture, where only one has been executed;¹ or as in the case of a partnership deed, in the possession of one of the partners.²

¹ *Underwood v. Miller et al.* 1 Taunt. Rep. 387.

² *Morrow v. Saunders*, 1 Brod. & Bing. Rep. 318.

CHAPTER VII.

BRIEF STATEMENT OF FACTS.

By *Stat. 1792. ch. 41.* it is enacted, that in all actions, wherein the defence intended to be set up by the defendant, is, or may be, that he was a justice of the peace, sheriff, deputy sheriff, or coroner, or a town, district, precinct, or parish officer, or some other officer, civil, or military; and that the act or thing for which he is sued, is any thing done by him, by virtue or in the execution of his office, the defendant may plead the general issue, and give the special matter in evidence, upon filing in the cause, a brief statement of such special matter of defence, within such time as the court shall order, of which statement the plaintiff shall be entitled to a copy; or he may plead specially at his election.

Time of filing. The statute provides, that a brief statement of facts must be filed, "within such time, as the court shall order." It is presumed, that the same rules would be applied in this case, as in that of special pleas, for which, in fact, a brief statement, in the cases where it is allowed, is a substitute. The defendant should either file his brief statement, or give notice on the clerk's docket, or to the plaintiff, of his intention to do so, as in the case of pleading double. Should he fail to do so, the court would not permit the plaintiff to be surprised, by the filing of one afterwards, but would grant him one continuance at least. And if the defendant, after giving notice of

his intention to file a brief statement, should neglect to do so, the court would order it to be done, as in the case of any other pleadings. But if, after notice, no application to the court be made by the plaintiff, and therefore, no time be set by the court, for filing the brief statement, it seems the defendant may do it, at any time before, or during the trial.

Requisites and effect of. The statute above cited, was intended for the relief and protection of magistrates and other officers in the execution of their duty. Much more has been done in England, to protect them from malicious and vexatious prosecutions, than has hitherto been found necessary here. There, previous notice must be given of the commencement of any suit against them, — the time within which they must be brought, is very limited, — and a right is secured, of tendering amends before action brought, or bringing money into court. The provisions of the English statutes, are extended also to all persons, aiding and assisting such officers.

The brief statement to be filed under our statute, need not have the same precision as a special plea, but it must set forth truly and particularly the facts, which the party intends to prove upon the trial; and any material variance will be fatal. Where the defendants justified as assessors of the Congregational Parish of Brewster, and offered to prove themselves assessors of the North Parish of Harwich, the court rejected the evidence.¹

Although the defendant is exempted from a strict adherence to form in his statement of facts, little advantage seems to be derived to him from this privilege.

¹ *Bangs v. Snow et al.* 1 Mass. Rep. 181.

The making of a plea is now a matter of little difficulty, and under the liberality of our practice, of no hazard; and if the defendant plead, the plaintiff is compelled to reply and traverse some particular allegation, while on a brief statement, the defendant is required to prove his whole case, and many defences, supposed to be good, have failed from the discovery, on the trial, of unsuspected defects in proceedings. The prudent course, therefore, seems to be, invariably to plead the defence, when the case admits of it.

Form. There is no technical form of a brief statement of facts. The form of the brief statement, and of the general issue, used in the case of *Bangs v. Snow et al.* before cited, may be found in the report of the case. X

Bangs v. Snow et al.
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CHAPTER VIII.

PLEADING DOUBLE.

At common law, the defendant could only have pleaded a single matter to the whole declaration, although to different parts of it, he might have pleaded different matters, as *not guilty* to one part, and *a release* to another. So where there were several defendants, they might have pleaded a single matter to the whole, or several matters, to different parts of the declaration.

Now by *Stat. 4. Anne, c. 16.* adopted as a part of our common law, the defendant or tenant, in any action or suit, or any plaintiff in replevin, may, with the leave of court,¹ plead as many several matters, as he shall think necessary for his defence.²

Leave to plead double, is granted of course, upon motion, subject to the rules established by the courts, in which it is made.

Time and mode of application. By the rule of the Supreme Court, leave to plead double is granted of course, on application to the clerk, by entering the motion on his docket, at any time within *two days* after the action is entered, — the day of the entry to be reckoned as one day; and by consent, or by special leave of court, upon good cause shewn, leave may be granted after that time.³

¹ *Jackson v. Stetson & ux.* 15 Mass. Rep. 48, 54.

² *Ibid.*

³ Reg. Gen. S. J. C. 2. Appendix A.

By the rule of the Court of Common Pleas, leave to plead double will be granted of course, on application to the clerk, and entered on his docket, within the first *four days* of the return term; and by special leave of the court, it may be entered after that time, for sufficient cause.¹

Nature of pleas. If any of the pleas filed, appear to be unnecessary or improper, they may be stricken out, on motion.²

So the defendant will not be permitted to plead two or more pleas, which are repugnant and inconsistent; and pleas which have been considered to fall within this objection, are, in actions on contract, the *general issue*, and a *tender*. Under the tender, the defendant brings the amount tendered into court, and a denial that he owes it, is plainly inconsistent.³

Other pleas, the court will, in their discretion, refuse to permit to be pleaded.⁴

A rule to plead double, does not generally, in practice, describe the several pleas, which the defendant may plead. If the plaintiff, however, request it, the court will require the motion to contain a statement of the several pleas, intended to be filed.⁵

Where several pleas are pleaded, under leave to

¹ 7th Rule C. C. Pleas. Appendix B.

² Reg. Gen. S. J. C. 2. Appendix A. *Jackson v. Stetson & ux.* 15 Mass. Rep. 48. *Martin v. Woods*, 6 Mass. Rep. 6. *Alderman v. French*, 1 Pick. Rep. 1. *Merry v. Gay*, 3 Pick. Rep. 388.

³ *McLellan v. Howard*, 4 Term. Rep. 194. *Jenkins v. Edwards*, 5 Term. Rep. 97.

⁴ *Samuels v. Dunne*, 3 Taunt. Rep. 386. *Shaw v. Everett*, 1 Bos. & Pul. Rep. 222. 2 Black. Rep. 1157, 1207. *Thayer v. Rogers*, 1 Johns. Cas. 152.

⁵ *Martin v. Woods*, 6 Mass. Rep. 6.

plead double, it is in the discretion of the judge who tries the cause, to allow or refuse the defendant, liberty to withdraw one of his pleas, and to plead anew.¹

The *Stat. of Anne*, does not extend to action *qui tam*; and therefore, there can be but one plea to such actions.² . Nor does it extend to *writs of error*.³

¹ *Alderman v. French*, 1 Pick. Rep. 1.

² *Law, q. t. v. Crowther*, 2 Wils. Rep. 21.

³ *Parker v. Gilson*, 1 Mass. Rep. 230.

CHAPTER IX.

PLEAS PUIS DARREIN CONTINUANCE.

If any matter of defence arise, during the pendency of the suit, of which the defendant could not have availed himself, at its commencement, he may plead it to the *further* maintenance of the suit; as if the plaintiff give the defendant a release, or a feme sole plaintiff marry, pending the suit.¹

These pleas are termed *pleas puis darrein continuance*, and may be in *abatement*, or in *bar*;— but judgment on the former is final, as well upon demurrer, as upon verdict, if a plea in bar had before been filed, for in *pleas puis darrein continuance*, there can be no judgment to answer over.²

These pleas are a waiver of all former pleas;³ and if the matter pleaded be found against the defendant, it is a confession of the whole declaration.⁴

These pleas may be pleaded at any stage of the cause, before the jury have returned their verdict; even after they have left the court to consider of it.⁵

The offer of this plea is a matter of right, it is said, and the court cannot refuse to receive it.⁶ It cannot,

¹ Bull. N. P. 310. Bro. Ab. Continuance. pl. 57.

² Freem. 252. Gilb. C. P. 105. Alleyn, 66. 1 Chitt. Plead. 635. *Renner et al. v. Marshall*, 1 Wheat. Rep. 215.

³ 1 Salk. 178. pl. 5. 1 Chitt. Plead. 636. 2 Tidd's Pract. 765.

⁴ Cro. E. 49. 3 Black. Com. 317.

⁵ 2 Esp. N. P. 577. *Broome v. Beardsley*, 3 Caines' Rep. 172. 12 Johns. Rep. 218. Bull. N. P. 310. 1 Chitt. Plead. 637. 2 Dunlap's Pract. 623.

⁶ *Broome v. Beardsley*, 3 Caines' Rep. 172. 1 Arch. Pract. 200, and cases cited.

however, be pleaded after a demurrer, nor after a verdict,¹ nor after referees have reported, for a reference is a substitute for a trial by jury.²

The proper course for the plaintiff, if he wish to avail himself of the objection, that the plea was not pleaded in season is, by motion to set it aside, and not by demurrer;³ — and it rests in the discretion of the court, to receive it or not, even after more than one term, between the time that the matter of the plea arose, and the coming in of the plea; and this discretion is governed by extrinsic circumstances, which cannot appear on the face of the plea.⁴

Great *certainty* is required in pleas *puis darrein continuance*. It is not only necessary to aver, that the fact relied on, happened *since the last continuance*, but the time and place should be specified, and the same rules are to be observed, as in other pleas, as to averments, proferts, &c.⁵

These pleas must be made and filed, in the manner which has been stated of pleadings generally. They are not required with us, as in the English practice,⁶ to be verified by affidavit.

¹ *Broome v. Beardsley*, 3 Caines' Rep. 172. 1 Arch. Pract. 200, and cases cited.

² 1 Paine & Duer. Pract. 508. and cases cited.

³ 1 Wend. Rep. 228.

⁴ 1 Paine & Duer. Pract. 509, and cases cited.

⁵ 2 Tidd's Pract. 766, 767.

⁶ *Ibid*, 767.

CHAPTER X.

STAYING PROCEEDINGS.

It is common, in England, for the defendant, where he admits the claim of the plaintiff, to the extent set forth in the writ, to move for a *stay of proceedings*, upon the payment of debt and costs, to save expense. In practice here, a defendant accomplishes the same object, by being defaulted, and moving to have judgment entered, which can be done, at any day of the term.

By *Stat.* 1829. *ch.* 128. *s.* 3. it is provided, that where a second action is brought by any party, his executor, administrator, or assignee, before the costs upon a nonsuit, in a previous one, brought by the same party, for the same cause of action, have been paid, the court or justice, before whom such second action is pending, shall have power to order further proceedings therein to be stayed, until the costs of such former suit have been paid; and in default of payment, may order such action to be dismissed.

This will be done, on motion by the defendant; but the court will not receive the application, until an execution shall have been issued for such costs, and payment thereof demanded of the party, or of the attorney, prosecuting such second suit.¹

¹ Vide *Melchart et al. v. Halsey et al.* 3 Wils. Rep. 149. *Doe ex. d. Walker v. Stevenson*, 3 Bos. & Pul. Rep. 22. *Cuyler v. Vanderwerk*, 1 Johns. Cas. 247. *Perkins v. Hinman*, 19 Johns. Rep. 237. *Jackson ex. d. Allen et al. v. Carpenter*, 3 Cowen. Rep. 22.

In the case of an injunction from the Court of Chancery, upon proceedings at law, though the injunction operates upon the parties only, yet it has been settled as a general rule, that courts of common law will take notice of it, for the purpose of promoting the ends of justice, and of preserving harmony between the two courts.¹

So where the court order a new indorser to the writ, in cases where one is required, on account of the insufficiency of the original indorser, the proper course would seem to be, to stay proceedings, until the order is complied with.²

So in an action of trespass, for an assault and battery, where an indictment against the same defendant is pending at the same term, the court will stay proceedings in the former, during the term, in which the latter is triable.

So where an action is brought, pending a reference, which it has been agreed shall operate as a stay of other legal proceedings, or otherwise contrary to good faith, the court will not suffer the plaintiff to proceed in it.³

So where an action is brought without authority.⁴

¹ *Hoyt v. Gelston et al.* 13 Johns. Rep. 139.

² Vide 2 Paine & Duer. Pract. 96.

³ 1 Tidd's Pract. 437.

⁴ Ibid. 1 Paine & Duer. Pract. 195.

CHAPTER XI.

APPEAL.

There is no instance at common law, of an appellate court retrying a cause by jury, except where the former judgment has been reversed or annulled. The practice is almost peculiar to New England, few innovations upon the common law having been made in this respect, in the other states of the Union.¹

In 1642, an ordinance was passed, providing for appeals; but the court appealed to, was to try the cause upon the same evidence, which was offered at the former trial. By *Stat. 7. Wm. III. c. 8.* and by other statutes, passed immediately after, the right to offer new evidence was given, and appeals were put upon the footing, on which they now stand.

SECT. I. IN WHAT CASES AN APPEAL LIES.

From justices of the peace. An appeal lies from the judgment of justices of the peace, in any civil action, where the defendant has appeared and pleaded.² By *Stat. 1809. ch. 108. s. 36.* the right of appeal, in prosecutions for militia fines, is restricted to cases, where the justice adjudges a forfeiture of more than *ten dollars*.

¹ *United States v. Wonson*, 1 Gal. Rep. 5. *Wetherbee v. Johnson et al.* 14 Mass. Rep. 412.

² *Stat. 1783. ch. 42. s. 6.*

Where the title to real estate is put in issue, the justice cannot proceed, but the party putting the same in issue, is *quasi* the appellant, and the case is carried to the Court of Common Pleas, in the same manner, as if it had been tried, and judgment rendered thereon by the justice.¹

From judges of probate. An appeal lies from any order, sentence, decree, or denial of any Judge of Probate.² This extends to decrees on subjects within the discretion of the judge, as well as on others; as if he refuse, on the petition of creditors, to extend the time for presenting claims against an insolvent estate.³ But no appeal lies from a decree authorizing an action on a probate bond, as a decree is unnecessary in such case; it is sufficient, if he assent. But if he refuse to deliver over the bond on application, this will be a denial, from which an appeal may be taken.⁴

Appeals from the probate court are constantly made from interlocutory decrees, and from decisions with regard to particular portions of causes; as, for instance, from a decree that administration shall be granted,⁵ or that an administrator shall answer interrogatories.⁶

From Court of Common Pleas. An appeal lies from the judgment of the Court of Common Pleas, in any real or personal action, wherein any issue has been joined, in which the debt or damage demanded, exceeds the sum of *one hundred dollars*;⁷ and from

¹ Stat. 1783. ch. 42. s. 2.

² Stat. 1817. ch. 190. s. 7.

³ *Walker v. Lyman*, 6 Pick. Rep. 458. Vide *Picquet, App't.* 5 Pick. Rep. 65. *Arms et al. v. Lyman*, 5 Pick. Rep. 210.

⁴ *Jones, App't.* 8 Pick. Rep. 121.

⁵ *Stebbins v. Palmer*, 4 Pick. Rep. 41. n.

⁶ *Saxton v. Chamberlain*, 6 Pick. Rep. 422.

⁷ Stat. 1820. ch. 79. s. 4.

judgments upon any issue in law, or case stated by the parties, unless otherwise agreed by them, if not originally commenced before a justice of the peace.¹

By *Stat.* 1785. *ch.* 48. in actions of *account*, the defendant may appeal from the judgment that he shall account; if he do not, but proceeds to account, and afterwards appeals from the final judgment, he shall not question the former judgment to account.

By *Stat.* 1786. *ch.* 53. *s.* 3, 4, in all actions and petitions for *partition*, the defendant may appeal from the interlocutory judgment that partition be made; and if he do not, he shall not afterwards, on an appeal from the *final* judgment, upon the return of the commissioners, question the propriety of the interlocutory one.

By *Stat.* 1784. *ch.* 28. *s.* 8. either party may appeal from a judgment upon *abatement*, or *demurrer*, without any further proceedings in the Court of Common Pleas. This does not embrace cases originally commenced before a justice of the peace.²

By *Stat.* 1797. *ch.* 63. *s.* 2. upon complaints by the owners of lands flowed by mill-dams, if the defendant shall by plea deny the complainant's allegations or title, or shall claim a right to flow without damages, or for an agreed compensation, either party may appeal from the judgment of the Court of Common Pleas, on any issue of fact or law resulting therefrom.

By *Stat.* 1798. *ch.* 77. *s.* 2. appeals may be made from the judgment of the Court of Common Pleas,

¹ *Stat.* 1820. *ch.* 79. *s.* 6. *Belcher v. Ward et al.* 5 Pick. Rep. 278.

² *Belcher v. Ward et al.* 5 Pick. Rep. 278.

on *bills in equity*, for the redemption of mortgaged premises.

SECT. II. TO WHAT COURTS APPEALS ARE MADE.

From judgments of justices of the peace, and of the Court of Common Pleas, appeals are made to the next term of the Court of Common Pleas, and Supreme Judicial Court respectively. Where the Court of Common Pleas, at the term at which an appeal is claimed, continues in session subsequent to the sitting of the Supreme Court, or is adjourned to a day subsequent, the appeal may be entered at the term of the Supreme Court, which commences after the day on which the appeal is claimed and perfected.

Appeals from the judge of probate, are required to be entered and proceeded upon, at the term of the Supreme Court, which shall be holden next after the expiration of *thirty-four days*, after the appeal is made,¹ reckoning the day on which the appeal is claimed, as one.²

SECT. III. REQUISITES TO AN APPEAL.

The *Stat.* 1820. *ch.* 79. *s.* 4. contemplates several requisites to an appeal.

¹ Stat. 1817. *ch.* 190. *s.* 7.

² *Wheeler et al. v. Bent*, 4 Pick. Rep. 167.

Note. For the *modes* of carrying cases from *State* courts to the courts of the *United States*, vide ante Book I. pages 7 and 10, — and *Wetherbee v. Johnson et al.* 14 Mass. Rep. 412.

1. It must be in *an action real or personal*; and it extends only to civil suits commenced by *writ*, and not to proceedings upon complaints authorized by particular statutes, where no appeal is expressly given.¹

No appeal lies, therefore, from an order of the Court of Common Pleas, for assessing the relations of a pauper, for his support under the *Stat. 1793. ch. 59. s. 3.*² Nor from an order discharging a servant or apprentice from his master, pursuant to *Stat. 1793. ch. 59. s. 5.*³

2. In appeals from the Court of Common Pleas, in personal actions, the *ad damnum* must exceed *one hundred dollars*. If the *ad damnum* exceed that sum, an appeal lies, although the claim set forth in the declaration be for a less sum. So, on the other hand, if the *ad damnum* be less, and the plaintiff recover a judgment for more, no appeal lies.⁴

An action for trespass *quare clausum fregit*, or for any other cause, in which the defendant pleads title, whether originally commenced in the Court of Common Pleas, or before a justice of the peace, is a real action, within the meaning and provision of *Stat. 1820. ch. 79.* in which an appeal lies.⁵

3. There must have been an issue joined between the parties. If the action be dismissed on motion, or otherwise disposed of, the remedy is by exceptions.⁶

There must be an issue in technical form, or, at

¹ *Lowell v. Spring*, 6 Mass. Rep. 398.

² *Nantucket v. Cotton*, 14 Mass. Rep. 243.

³ *Smith et al. v. Hubbard*, 11 Mass. Rep. 24.

⁴ *Chamberlain v. Cochran*, 8 Pick. Rep. 522.

⁵ *Blood v. Kemp*, 4 Pick. Rep. 169. *Davis v. Masson*, 4 Pick. Rep. 156.

⁶ Vide Bills of Exceptions, Chap. XII. *supra*.

least, the pleadings must be in such a form as to present a question of fact, to be tried by a jury, or a question of law to be decided by the court,¹ as upon demurrer.² But in a trustee process, the declaration of the supposed trustee, that he has no goods, &c. and the examination by the plaintiff, constitutes an issue within the statute, and either party may appeal from the decision, although the defendant in the cause may not have appeared.³

4. It is necessary that there should have been a judgment, and this, except in cases specially exempted by statute, viz. abatement, demurrer, partition, and account, must be a *final judgment*. No appeal lies, therefore, from interlocutory decrees, or proceedings; as, for instance, if the court should order a new indorser to be furnished, or grant an amendment, or refuse to dismiss the action, or to nonsuit the plaintiff.⁴

But any final disposition of the case, or sending the parties out of court, will be sufficient to sustain an appeal; as where the Court of Common Pleas arrests the judgment, and so renders none;⁵ or where an action is dismissed without costs, because the writ is lost from the files,⁶ or for want of an indorser.

The provision of the statute is not confined to a technical judgment, in which an execution might

¹ *Purple v. Clark et al.* 5 Pick. Rep. 206. *Wood v. Ross*, 11 Mass. Rep. 271, 275. 2 *Greenleaf* Rep. 310.

² Stat. 1820. ch. 79. s. 4. *Belcher v. Ward et al.* 5 Pick. Rep. 278.

³ *Richards v. Allen & Tr.* 8 Pick. Rep. 405.

⁴ *Lamphear v. Lamprey*, 4 Mass. Rep. 107.

⁵ *Bemis v. Faxon*, 2 Mass. Rep. 141.

⁶ *Gilbreth v. Brown et al.* 15 Mass. Rep. 178.

issue, but extends to any final determination of an action, whether by order or judgment.¹

The *Stat.* of 1782. *ch.* 11. originally creating the Court of Common Pleas, is not repealed, by the subsequent statutes, except so far as they embrace the same matters; and the general right of appeal given in the first statute, still remains, where not since restricted. Thus in actions of *replevin*, and in writs *de homine replegiando*, where there is no *ad damnum*, an appeal lies.²

SECT. IV. INCIDENTS TO AN APPEAL.

Who may appeal. In courts of law, either party of record may appeal.

In the case of several plaintiffs, they must all join in the appeal; but where there are several defendants, or other parties connected on the record with the suit, any one may appeal, though the others do not, or should dissent; thus, trustees, or persons claiming by assignment, goods or effects in the hands of trustees, or creditors in the subsequent suits, who are admitted to defeat fraudulent attachments, may appeal.³

An appeal from a decree of a *Judge of Probate*, can be made only by some person interested, or by his executor or administrator.⁴ And it has been holden, that a mere debtor to an intestate, is not interested in

¹ *Tappan v. Bruen*, 5 Mass. Rep. 193. *Wood v. Ross*, 11 Mass. Rep. 271. *Rathbone v. Rathbone*, 4 Pick. Rep. 89.

² *Wood v. Ross*, 11 Mass. Rep. 271.

³ Stat. 1817. *ch.* 148. s. 1. Stat. 1823. *ch.* 142. s. 5.

⁴ *Downing v. Porter*, 9 Mass. Rep. 386.

the proceedings respecting the administration upon the estate, and cannot appeal from a decree, granting such administration.¹

Where the intestate left a widow and child, and the child afterwards died, and administration was then granted on the estate of the father, to one of his creditors, it was holden, that a brother of the intestate could not appeal from this decree, the widow, as heir of the child, being the only person interested.²

Time of claiming an appeal. By the colony law of 1651,³ giving a right of appeal, it is provided, that it may be claimed at any time before execution is granted, which shall not be until twelve hours after judgment is rendered.

In the statute regulating appeals *from justices of the peace*,⁴ no time is fixed within which an appeal from their judgments may be claimed. It has been decided, however, in the Court of Common Pleas, that an appeal from a justice, not made until the day after judgment was rendered, though before execution had issued, and within twenty-four hours after the rendition of judgment, could not be sustained.⁵ But an appeal, claimed at any time during the day on which the judgment was rendered, would probably be sustained, it being the common practice, to consider the whole of the return day, or the day of trial, before a justice, as the session of the court, and to allow the party claiming the appeal within that time, *twenty-four*

¹ *Swan v. Picquet*, 3 Pick. Rep. 443.

² *Stebbins v. Palmer*, 4 Pick. Rep. 41, note.

³ Anc. Charters, &c. 46.

⁴ Stat. 1783. ch. 42.

⁵ *Leonard v. Downs*, C. C. P. 1826. Mss.

hours from the rendition of judgment to find his sureties, and to recognize to prosecute his appeal, &c.

An appeal may be claimed from a decree of the *Judge of Probate*, at any time within *one calender month* from the time of rendering the decree.¹

In the statute,² regulating appeals from the *Court of Common Pleas*, nothing is expressly enacted, as to the time when an appeal must be claimed; but as the party is required to recognize to prosecute his appeal, it is obviously necessary that it should be done during the term of the court, at which the verdict or judgment is rendered; and such is the practice.

Mode of claiming an appeal. No written motion is necessary for the purpose of claiming an appeal. It is sufficient to make the claim before the clerk, who enters the fact upon the docket; nor is it necessary, that the other party should be notified.

In an appeal from the decree of a *Judge of Probate*, filing the reasons of the appeal within one month from the time of making the decree, is a claim of appeal within the statute.³

Duty of the appellant. Before the appeal can be allowed, the appellant from the judgment of a *justice of the peace*, must “recognize with one or more sureties, in such sum not exceeding *ten pounds*, as the justice shall order, to pay all intervening damages and costs, and to prosecute his appeal with effect.”⁴

In appeals from justices, where the title to real estate

¹ Stat. 1817. ch. 190. s. 7. Stat. 1783. ch. 46. *Hunt & ux. v. Holden*, 2 Mass. Rep. 170. *Avery et al. v. Pixley*, 4 Mass. Rep. 460.

² Stat. 1820. ch. 79. s. 4.

³ *Avery et al. v. Pixley*, 4 Mass. Rep. 460.

⁴ Stat. 1783. ch. 42. s. 6.

is brought into question by the pleadings, the sum in which the party must recognize, is left by the statute, discretionary with the justice.¹

In the *Probate Court*, the appellant must, within *ten days* after claiming the appeal, give a bond, and file it in the probate office, for the prosecution of the appeal with effect, and for paying all intervening damages and costs, and such further costs, as the Supreme Court of Probate shall tax against him. Within *ten days* after the bond is given, he must file the reasons of his appeal in the Probate Court, and must serve the adverse party or parties, with an attested copy of such reasons, *fourteen days* at least before the sitting of the Supreme Court.²

No provision is made, as to the penal sum for which the bond shall be given, or that the appellant shall furnish a surety or sureties in the bond; nor, if the sufficiency of the bond be in any respect questioned, is there any power given to decide upon it.

In the Court of Common Pleas, the appellant must, during the term of the court, at which the appeal is claimed, “recognize with sufficient surety or sureties, to the adverse party, in a reasonable sum, to prosecute his appeal to the court appealed to, and to pay all such costs as may arise after the appeal,” as shall be recovered against him.³

The party need not personally appear to recognize, but may do it by attorney.⁴

¹ Stat. 1783. ch. 42. s. 2.

² Stat. 1817. ch. 190. s. 7.

³ Stat. 1820. ch. 79. s. 4.

⁴ *Adams et al. v. Robinson et al.* 1 Pick. Rep. 461.

The appellant must, in all cases, produce at the court appealed to, copies of the case, and must duly enter the appeal.¹

Proceedings where an appeal fails through accident. By *Stat.* 1791. *ch.* 17. *s.* 1. where by reason of any accident, mistake, or unforeseen cause, an appeal from the Court of Common Pleas, is not entered at the proper term of the Supreme Judicial Court, that court may, at their discretion, on petition presented within *one year* from the time when the appeal ought to have been entered, order such appeal to be entered, at any other term of the court, and shall try the same, as if it had been entered at the proper term; but the attachment and bail on the original writ, are to remain discharged.

By *sect.* 3. of the same statute, and by *Stat.* 1822. *ch.* 61. the Court of Common Pleas have the same powers, respecting appeals from judgments rendered by justices of the peace.

No provision is made for cases where, by accident, an appeal is not duly claimed; the remedy in such case, if any, must be under the general power to grant reviews.

By *Stat.* 1817. *ch.* 190. *s.* 8. where, by accident, mistake, or otherwise, a party shall not have appealed from a decree of the *Judge of Probate* the Supreme Court, upon petition within *one year* after the decree is made, and after notice to the parties interested, may grant an appeal, if it shall appear, that the petitioner has not lost his appeal by his own neglect.

¹ Vide Book I. Chap. XVII.

It was holden, in *Amherst Academy v. Johnson*,¹ that where an appeal was regularly made, but notice of the reasons was not seasonably served on the adverse party, the case was within this statute, and that the omission to serve them, through the negligence of the attorney, was not such a neglect of the party, as to deprive him of the benefit of the statute.

The same provisions are made, in the case of appeals from the Court of Common Pleas, and from justices, with regard to complaints for affirmation of judgment, which are through accident, not made in season; but none with regard to such complaints in probate cases. These latter, however, might be considered to come within the equity of the statutes.

Effect of an appeal. From the moment when an appeal is properly claimed and allowed, the judgment appealed from becomes wholly inoperative, and no execution can issue upon it; nor can it be the foundation of an action of debt, or a bar to another action for the same cause, even if the appellant fail to enter or prosecute his appeal.² If an appellant do not enter his appeal, the remedy of the appellee is, to complain of his neglect, and pray affirmation of the judgment appealed from.

The effect is the same, if the appeal, when duly claimed, be not allowed. The appeal is valid; and although the court below decide that it is not, and refuse to receive the recognizance of the party, and proceed to judgment and execution, yet the court above

¹ Hampshire S. J. C. Sept. T. 1823. Mass.

² *Campbell v. Howard*, 5 Mass. Rep. 376.

will sustain the appeal, and take the proper measures to give it effect.¹

But if an appeal be claimed in a case not authorized by law, it will be dismissed, and the judgment below remain in full force.² The appeal, in such a case, is a mere nullity, even if it should be allowed; the case remains where it was, and all proceedings upon it, in the court above, are erroneous; and if in such cases, the appellant fail to produce the papers, and enter the appeal, the court above will not, on complaint of the appellee, affirm the decision appealed from, or allow costs. The recognizance of the appellant in the court below to prosecute, is void, and he cannot suffer by not fulfilling its condition.³

In actions at common law, an appeal necessarily removes the whole case. If one defendant be defaulted, and the other appeals, or if, in a trustee process, the principal be defaulted, and the trustee appeal, and *vice versa*, the party appealing carries the rest with him.

All such actions are in general tried on the appeal, without any reference to the proceedings in the court below. Thus the plaintiff may move for a new indorser, or the defendant, to have the action dismissed, or to plead double, or in abatement, although the same motions were overruled, in the court below; and a plea to the action, or further

¹ *Bemis v. Faxon*, 2 Mass. Rep. 141. *Lamphear v. Lamprey*, 4 Mass. Rep. 107.

² *Commonwealth v. Messinger*, 4 Mass. Rep. 462, 471.

³ *Campbell v. Howard*, 5 Mass. Rep. 376. *Wetherbee v. Johnson et al.* 14 Mass. Rep. 412. 2 New Hamp. Rep. 223.

proceedings of any kind will be no waiver of the objection, although no exceptions were taken in the court below.¹

Where, however, one defendant is defaulted, in the court below, and the other, after a trial, appeals, it has not been considered, that the cause could be open for trial on appeal, as to both. And in some cases, an order, though erroneous, cannot be reversed, where it has been executed; thus, an order to furnish a new indorser, or to exhibit books or papers for the inspection of the adverse party, although objected to, cannot be annulled, if they have been complied with. And in *partition* and *account*, if the cause have proceeded to final judgment in the court below, on an appeal therefrom, the interlocutory decrees cannot be re-examined.

If the appellant omit to enter his appeal, it does not revive or restore the judgment appealed from, for that is, to all intents and purposes, vacated. Even a judgment in favor of a defendant, from which the plaintiff has appealed, can never be pleaded as a bar to a new action; and to obtain the benefit of the former proceedings, the appellee must present a complaint to the court appealed to, at the term when the appeal ought, in due course, to have been entered, praying that the former judgment be affirmed. Instead, however, of its being the affirmation of a former judgment, it is in fact a new judgment for the same thing.

In cases where the defendant appeals from a justice of the peace to the Court of Common Pleas, and fails to enter his appeal, the plaintiff has judg-

¹ *Rathbone v. Rathbone*, 4 Pick. Rep. 89.

ment for his demand, as ascertained by the former judgment, and for interest by way of damages.

In appeals from the *Judge of probate*, the decree is simply affirmed without damages.¹ In some cases, the decree of affirmation is remitted to the *Judge of probate*, for further proceedings; in others, it remains and takes effect, as a judgment of the court appealed to.

¹ *Rathbone v. Rathbone*, 4 Pick. Rep. 89.

CHAPTER XII.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

By *Stat. West*, 2. c. 31. (13. *Ed. I.*) if the judge who tries the cause, mistake as to the law, the counsel of either side may require him to sign and seal a bill of exceptions, stating the point in which he is supposed to err.

In the English practice under this statute, the exceptions must be to the direction, or decision of the judge, upon some point of law, either in admitting or refusing evidence, or a challenge, or upon some point of law arising upon a fact not denied, in which either party is overruled by the court.¹ The bill of exceptions must be tendered at the trial, — and the substance of it reduced to writing, at the time the objection is made, though it need not then be reduced to form.² If the exceptions be truly stated in the bill, the judge should then affix his seal to it; and if he refuse, a writ is given to compel him.³ The bill of exceptions being thus sealed, both parties are concluded by it, as to the truth of the matters it contains. When the bill of exceptions has been completed, and judgment given on the verdict, a writ of error is brought, to present the question to a court of error, as it cannot be determined by the court, in which the record is made up. Upon the return of the writ of error, the

¹ Bull. N. P. 316.

² Ibid.

³ 3 Black. Comm. 372.

judge is called upon to confess, or deny his seal.¹ If he confess it, the bill of exceptions and all the proceedings are entered upon the record, — the party assigns his errors, — and the court proceed to determine the question.² The judgment on the writ is, that the former judgment be either affirmed, or reversed.

The *Stat. West* 2. forms a part of our common law, and the right has frequently been exercised in our practice. It has, however, been, in a great measure, superseded in England, by motions for new trials, and, in this state, by the statute provisions respecting exceptions.

By *Stat.* 1804. *ch.* 105. *s.* 5. it is provided, “that whenever the Supreme Court shall be holden by any one of the justices thereof, it shall be lawful for any party, thinking himself aggrieved by any opinion, direction, or judgment of the said justice, in any action or process of a civil, or criminal nature, to allege exceptions to the same, at the term of said court, when such opinion, direction, or judgment shall be given or pronounced: and such exceptions, being reduced to writing in a summary mode, and presented to the court, before the adjournment thereof without day, and found conformable to the truth of the case, shall be allowed and signed by the justice holding said court; and thereupon all such action or process, in or upon which judgment shall not have been rendered, at the time of allowing such exceptions, shall be continued to the

¹ Vide *Money et al. v. Leach*, 3 Burr. Rep. 1692, where the form of writ to summon in the judge to confess or deny his seal, is given.

² Ibid. Bull. N. P. 316, where the form of a bill of exceptions, and of the record, is given at length.

next term of the said court, to be holden in the same county : ” — “ and such action or process, wherein exceptions shall be alleged to the final judgment of the court thereon, shall likewise be continued in the same manner, and execution thereon shall be stayed, but without prejudice to any attachment made on the original writ, in any civil action. *Provided however*, that no trial by jury shall be delayed or prevented, by the making or filing of exceptions to the opinion or judgment of the court, upon any dilatory plea, or upon any question of law, arising during the trial ; and whenever it shall appear to the court, that the exceptions, made in or after the trial of any cause, are frivolous, immaterial, or intended for delay, judgment may be entered, and execution awarded or stayed, on such conditions, as the court may deem reasonable, notwithstanding the allowance of the proceedings ; and the court, to which actions may be continued upon exceptions filed and allowed, shall have cognizance thereof, and shall do therein what to law and justice shall appertain.”

By *Stat. 1820. ch. 79. s. 5.* it is provided, that it shall be lawful for either party, thinking himself aggrieved by any opinion, direction, or judgment of the *Court of Common Pleas*, in any matter of law, to allege exceptions to the same, which exceptions being reduced to writing, in a summary mode, and being presented to the court, before the adjournment thereof, and found conformable to the truth of the case, shall be allowed and signed by the presiding judge, or justice of said court, and thereupon all further proceedings in such action in said court shall be stayed, and the party making such exception shall enter such action at the Supreme Judicial Court, at the next term

thereof for the same county; and shall produce there a copy of all the papers, as in case of appeal. And the said Supreme Judicial Court shall have cognizance thereof, and consider and determine the same action, in the same manner as they are authorized to do, in respect to actions in which questions of law are reserved, in any of the modes prescribed by law, by any one justice of the Supreme Judicial Court, and shall render judgment, and issue execution thereon, or may grant a new trial at the bar of said court, as law and justice shall require.¹

SECT. I. IN WHAT CASES EXCEPTIONS MAY BE
TAKEN.

In Supreme Judicial Court. Under *Stat.* 1804. *ch.* 105. *s.* 5. in all trials in the Supreme Court, exceptions may be alleged to any direction or decision, by the judge who tries the case, upon any point of law arising therein, during the course of the trial, except the point decided be some one within his sole discretion, and also to the final judgment in the case.

In Court of Common Pleas. Notwithstanding the very general terms of the *Stat.* 1820. *ch.* 79. *s.* 5. there are some cases, in which it has been holden not to apply.

1. Whenever the party has a right of appeal from the Court of Common Pleas, he cannot bring a writ of error, or allege exceptions.²

¹ As to *costs*, where the exceptions are deemed frivolous, or intended for delay, or where the action is not entered, vide ante *Costs*, Book I. Chap. XXVII. page 303.

² *Champion v. Brooks*, 9 Mass. Rep. 228. *Rathbone v. Rathbone*, 4 Pick. Rep. 89.

But to an order dismissing an action, though the *ad damnum* exceed *one hundred dollars*, yet if the defendant have not pleaded, the statute does not apply ; for there having been no issue joined, the plaintiff has no right of appeal.¹

2. Where the proceeding in the Court of Common Pleas, is such an one, that the Supreme Court cannot, upon reversing their order, proceed to grant a new trial at their own bar, one cannot allege exceptions ; thus upon a complaint under *Stat. 1785. ch. 66. s. 2.* for the maintenance of a bastard child,² exceptions cannot be alleged ; so on a judgment rendered upon a report of referees, on a submission before a justice of the peace.³ But exceptions have been sustained, to proceedings on the report of referees, on a submission under a rule of court, because, in this case, the action may be tried in the Supreme Judicial Court, and judgment entered, as in other cases.⁴

3. When the proceeding complained of, is within the discretion of the Court of Common Pleas, and so not a “matter of law ;” —as the granting or refusal of a continuance,⁵ or refusing to bring forward an action, which had been defaulted at the first term, in consequence of the plaintiff’s ignorance that the defendant was out of the commonwealth,⁶ exceptions cannot be alleged.

4. When the decision of the Court of Common Pleas is interlocutory, and they do not finally dispose

¹ *Purple v. Clark et al.* 5 Pick. Rep. 206.

² *Gile v. Moore*, 2 Pick. Rep. 386.

³ *Dean v. Dean*, 2 Pick. Rep. 25.

⁴ *Miller v. Miller*, 2 Pick. Rep. 570. *Olney v. Brown*, 2 Pick. Rep. 572.

⁵ *Reynard v. Brecknell*, 4 Pick. Rep. 302.

⁶ *Whitney v. Thayer*, 5 Pick. Rep. 528.

of the case, — as on a refusal to dismiss an action, for want of an indorser,¹ — or on an order, that a trustee should answer certain interrogatories,² exceptions cannot be sustained ; but they will be sustained, to a refusal by the Court of Common Pleas, to submit the question of assignment under a trustee's answer, to the jury,³ — and also to any error of law, in assessing damages, or in ascertaining the amount of damages by a jury, after a default.⁴

In all these cases, however, in the Court of Common Pleas, which have been holden not to be within the statute, exceptions may be filed, and after final judgment, will be available.

SECT. II. PROCEEDINGS IN TAKING EXCEPTIONS.

1. *In Supreme Judicial Court.* The exceptions under *Stat. 1804. ch. 105. s. 5.* whether they be to some direction or decision of the judge, in the course of the trial, or to the final judgment, are generally at first taken verbally, at the time the objections occur, though, it seems, that this is not necessary, but they may be taken at any time during the term.⁵

If the exceptions taken, be to an opinion, or judgment of the court, upon any dilatory plea, or upon any question of law arising during the trial, the trial by the jury is not thereby delayed or prevented, but proceeds in the same manner, as if no exceptions had been taken.

¹ *Ely et al. v. Ball et al.* 8 Pick. Rep. 352. Vide *Purple v. Clark et al.* 5 Pick. 206.

² *Piper v. Willard & Tr.* 6 Pick. Rep. 461.

³ *Ammidown v. Wheelock & Tr.* 8 Pick. Rep. 470.

⁴ *Storer v. White*, 7 Mass. Rep. 448.

⁵ *Buckland v. Charlemont*, 3 Pick. Rep. 173.

Whether the exceptions were or were not alleged, at the time the objections occurred, the party making them *must*, before the adjournment without day of the court, at which the trial is had, and before judgment is rendered, if the exceptions be to any direction or opinion in the course of the trial, — reduce them to writing, with a sufficient statement of the case, merely to show the points intended to be presented, not reciting any part of the record or pleadings, but referring to them as already before the court, and present the written statement to the judge who presided at the trial.

If the exceptions be correct, the judge merely signs them, sealing not being necessary, as in *bills of exceptions*; and if correct, he must sign them.

Further proceedings in the case are then stayed, that is, if the exceptions be to any decision in the course of the trial, no judgment is rendered, — and if to the final judgment, execution, without prejudice to any attachment, is stayed, — unless the exceptions made in or after the trial be, by the judge who tried the case, and to whom they are offered, deemed frivolous, or intended for delay, in which case, notwithstanding the allowance of the exceptions, he may enter judgment, and award or stay execution, on such conditions, as he may deem reasonable.¹

If the proceedings be stayed, the clerk minutes on the docket, that points of law are to be determined, and the case stands continued to the next term of the court.

The party excepting must then furnish the court with copies of the exceptions, — one copy for each judge, — in proper time before the next law term, to

¹ *Brown v. Bull*, 3 Mass. Rep. 211.

which the case is continued, at which term the cause is heard and determined upon the exceptions, and the court is authorized to do therein, what to law and justice shall appertain.

2. *In the Court of Common Pleas.* The exceptions to any opinion, direction, or judgment of a judge of the Court of Common Pleas, are taken in the same manner, and must be reduced to writing, and presented to the judge for his signature, in the same mode, and within the same time, as in the Supreme Court. Further proceedings are then, in like manner, stayed in the Court of Common Pleas,

The party excepting must then enter the action, at the next term of the Supreme Court, for the same county, and produce there a copy of all the papers, as in case of an appeal.¹ The cause is then heard and determined upon the exceptions, by the court, in the same manner, as where exceptions are taken before one of its own judges, who will render judgment, and issue execution thereon, or grant a new trial at its own bar, as justice may require.

However frivolous may be the exceptions taken in the Court of Common Pleas, and though intended only for delay, proceedings in that court must be absolutely stayed;—no discretion being given to the judge of the Court of Common Pleas, as there is to the judge of the Supreme Court, to stay the proceedings or not. But the Supreme Court, when the case arrives there, if they deem the exceptions frivolous, or intended for delay, or if the party excepting shall fail to enter his action, at the first succeeding

¹ Vide ante page 445.

term of said court, and the adverse party complain thereof, as in case of appeal, may award double costs against the party excepting. And even if the exceptions be not deemed frivolous, but only insufficient, the Supreme Court shall increase the damages originally recovered, by adding *six per cent.* interest, to the time of final judgment, but shall award single costs only..

Exceptions with us, are not usually made the foundation for a writ of error, in any case commenced in the Common Pleas, nor do they, it is presumed, form a part of the record of the case, so that a writ of error will lie to the same court; for they operate to transfer the cause to another court. The questions, however, intended to be raised, are more readily brought before the whole court, and the error, if any, corrected more speedily, and at less expense, in the mode pointed out by the statutes, than by a writ of error.

SECT. III. AT WHAT TIME EXCEPTIONS SHOULD BE TAKEN.

Both the statutes before cited, provide that the exceptions must be taken during the term, at which the trial takes place. And where the judge of the Court of Common Pleas certified, that after the verdict was returned, the defendants excepted to his instructions, and he allowed them, notwithstanding it was contended on the other side, that the defendants had lost their right of exceptions, by acquiescing in the instructions, until the verdict was returned, it seems to have been holden, that the exceptions were seasonably taken.¹

¹ *Buckland v. Charlemont*, 3 Pick. Rep. 173. Vide *Pease v. Whitney et al.* 4 Mass. Rep. 507.

But in *Train v. Collins*,¹ it was decided that an erroneous instruction was no ground for a *new trial*, partly because it was immaterial, but principally because it was not objected to by the counsel, at the time it was given.

No irregularity in the filing of exceptions will be noticed by the Supreme Court, unless it appear by the certificate of the judge, who allowed them.²

SECT. IV. EFFECT OF FILING EXCEPTIONS.

When exceptions are properly filed, all proceedings in the cause are absolutely at an end, and if the Court of Common Pleas should proceed further, it would be error.

If, however, exceptions be filed improperly, they can have no legitimate effect upon the cause.

The Court of Common Pleas may, and, in doubtful cases, will suspend its action, merely continuing the cause, until it is decided by the Supreme Court, whether the exceptions are duly taken; but they may also disregard them, and proceed to final judgment.

On the hearing of a cause upon a bill of exceptions, no fact contained in the bill can be contradicted; nor will any other evidence be received of what took place at the trial. Nor will any objection be considered, which was not raised and overruled in the court below, unless it is such an one, as could not have been met and obviated by amendment, or other evidence.³

¹ 2 Pick. Rep. 145.

² *Whitcomb et al. v. Williams et al.* 4 Pick. Rep. 228.

³ *Spaulding v. Alford*, 1 Pick. Rep. 33. *Beekman v. Frost*, 18 Johns. Rep. 554.

CHAPTER XIII.

WRIT OF ERROR.

Nature of. A writ of error is an original writ, in the nature of a commission to the judges of the court, from which it issues, authorizing and requiring them, to examine the grounds, upon which a judgment, either in their own, or an inferior court, was given, in the case specified in the writ, and upon such examination, to alter, reverse, or affirm the same, according to law.

The writ must be indorsed, when the plaintiff is not an inhabitant of or removes from, the Commonwealth, within *Stat.* 1833. *ch.* 50.

A writ of error, in *civil* cases, is a writ of right, grantable *ex debito justitiæ*, and may be sued out without motion.¹

SECT. I. TO WHAT COURT A WRIT OF ERROR LIES.

In *Massachusetts*, a writ of error lies only to the Supreme Judicial Court, from which court alone the writ can issue.

In *England* and *New York*, there are several courts capable of entertaining writs of error. And the rule, in those places, as to those courts, is, that a writ of error may be brought either in the same court, where the

¹ 2 Salk. 504. *Pembroke v. Abington*, 2 Mass. Rep. 142. *Skipwith v. Hill*, 2 Mass. Rep. 35.

judgment was given, in which case it is called "*error coram nobis*," — or in a superior court; the distinction being, that where the error is in the process, or through the default in the clerks, — or is an error *in fact*, — or where a writ of error from an inferior court has been quashed, for any fault but variance; — in these cases, a writ of *error coram nobis* lies to the same court, in which the judgment was given; but if the error be in the judgment itself, and an error *in law*, the writ must be brought to another and a superior court.

These rules and distinctions, however, do not exist here. But in whatever court the judgment was rendered, and whether the error be *of fact* or *of law*, the writ of error, if it lie at all, lies only to the Supreme Judicial Court.¹

SECT. II. FROM WHAT COURTS AND IN WHAT CASES ERROR LIES.

A writ of error lies from the Supreme Judicial Court, the Court of Common Pleas, or a justices' court, where a person is aggrieved by an error in the foundation, proceeding, judgment, or execution, of a suit therein.²

These three courts are the only ones from which, under any circumstances, a writ of error will lie. But in order that a writ of error from either of them may be sustained, several things are necessary.

¹ This will of course be understood, with the exception of those cases, which may be carried by a writ of error, from *state courts*, to the Supreme Court of the *United States*, for which cases vide ante page 7.

² Co. Litt. 288 b.

1. The error must be one in *substance*, not aided or amendable at common law, or by statute.¹

2. The error complained of must be *disadvantageous* to the party assigning it.

Thus, in proceedings for the removal of a pauper, neither of the parties can assign for error, that the pauper was not summoned, nor present at the trial; for though the pauper might avail himself of the error, neither of the other parties suffers by it.²

So, if in a trustee process, judgment be rendered against the trustee, where no service of the writ is made upon him, the principal defendant cannot avail himself of this error, as he is not injured by it.³ But the trustee himself might; and upon a writ of error brought by him, the court would reverse that part of the judgment only, which awarded execution against the effects of the principal in the hands of the trustee.⁴

So the party, in whose favor referees allow a claim not submitted to them, cannot complain of the allowance, or assign it for error.⁵

3. There must have been no *agreement* not to bring a writ of error by the party bringing it; for if a party or his attorney enter into any agreement, not to bring a writ of error, he is afterwards precluded from bringing it, though there be manifest error in the record.⁶

Where the defendant's attorney agreed not to bring a writ of error *in the action*, it was holden, that the defendant's executors were thereby precluded from

¹ *Buckfield v. Gorham*, 6 Mass. Rep. 445.

² *Shirley v. Lunenburgh*, 11 Mass. Rep. 379.

³ *Whiting v. Cochran*, 9 Mass. Rep. 532.

⁴ *Ibid.*

⁵ *Lyman v. Arms et al.* 5 Pick. Rep. 213.

⁶ *Camden et al. v. Edie*, 1 H. Black. Rep. 21. *Cates v. West*, 2 Term. Rep. 183.

bringing error on a judgment in a *scire facias*, which was brought against them to revive the judgment, upon the death of the defendant, the *scire facias* being considered so far a continuation of the old action, as to be affected by the original agreement.¹

And it has been holden, that on a judgment rendered upon a submission to the court, on a *case stated by the parties*, a writ of error will not lie.²

But an agreement not to appeal, does not preclude the party making it, from bringing a writ of error.³

4. The writ must be brought only after judgment, or after an award in the nature of a judgment.⁴

5. The judgment complained of must have been rendered in a court of record, and acting according to the course of the common law.⁵ A writ of error, therefore, does not lie to a Court of Probate,⁶ or to a court martial.⁷

But the fact, that the court derives its jurisdiction of the subject matter from, and that the mode of process is specially directed, by statute, does not bar a writ of error, if the proceedings be according to common law.⁸

The cases, where for the reason, that the proceedings in the case are not according to the course of the

¹ *Ex'rs. of Wright v. Nutt*, 1 Term. Rep. 388.

² *Alfred v. Saco*, 7 Mass. Rep. 380. *Carroll et al. v. Richardson*, 9 Mass. Rep. 329. *Gray v. Storer*, 10 Mass. Rep. 163. *Wellington v. Stratton*, 11 Mass. Rep. 394.

³ *Putnam v. Churchill*, 4 Mass. Rep. 516.

⁴ Co. Litt. 288 b. *Droune v. Stimpson*, 2 Mass. Rep. 441.

⁵ 1 Salk. 263. *Groenvelt v. Burwell et al.* 1 Ld. Ray. Rep. 454. *Commonwealth v. Ellis*, 11 Mass. Rep. 466.

⁶ *Smith v. Rice*, 11 Mass. Rep. 507.

⁷ *Ex parte Dunbar*, 14 Mass. Rep. 393.

⁸ *Droune v. Stimpson*, 2 Mass. Rep. 441. *Short v. Pratt*, 6 Mass. Rep. 496.

common law, *certiorari*, and not *error*, is the proper mode to remove the case to the Supreme Judicial Court, for the correction of any errors in the judgment, may be found under the title of *Certiorari*.¹

6. The last requisite to be named is, that the party aggrieved have no right of appeal, to the Court of Common Pleas, if the judgment were rendered by a justice, — or to the Supreme Judicial Court, if the judgment were rendered by the Court of Common Pleas ;² — or, without laches on his part, have lost, or cannot avail himself of an appeal, or other remedy, as,

1. By *agreement*. Thus, if a party to an action pending in the Court of Common Pleas, make an *agreement* on record, that he will not *appeal* from the judgment of that court, he may maintain a writ of error, although he might have appealed, had he not waived his right, by his agreement.³

2. By *infancy*. Thus, a writ of error lies to reverse a judgment against an infant, in a case where an appeal lies, because the infancy of the party would disable him from appealing.⁴

3. By *want of notice of the suit*. Thus, a writ of error lies on a judgment of the Court of Common Pleas, rendered against the defendant by default, who had no notice of the suit, as from being out of the Commonwealth, or other cause, although the case be one that is open to an appeal.⁵

¹ Chap. XIV. *supra*.

² *Savage v. Gulliver*, 4 Mass. Rep. 171. *Putnam v. Churchill*, 4 Mass. Rep. 516. *Jarvis v. Blanchard*, 6 Mass. Rep. 4. *Champion v. Brooks*, 9 Mass. Rep. 228.

³ *Putnam v. Churchill*, 4 Mass. Rep. 516.

⁴ *Valier et al. v. Hart et al.* 11 Mass. Rep. 300.

⁵ *Skipwith v. Hill*, 2 Mass. Rep. 35. *Smith v. Rice*, 11 Mass. Rep. 507. *Thatcher et al. v. Miller*, 11 Mass. Rep. 413. *Same v. Same*, 13 Mass. Rep. 270.

A right to file exceptions, however, under our statute, has been holden not to be equivalent to a right of appeal. And, therefore, in a case where the *ad damnum* in the writ not exceeding *one hundred dollars*, there was no right of appeal, but the party aggrieved might have excepted, he was still allowed to maintain a writ of error.¹

If it appear on the record, that the plaintiff in error might have appealed, the court will *ex officio* quash the writ; or they will quash it, on a plea in abatement disclosing the plaintiff's remedy by appeal.²

SECT. III. FOR WHAT ERRORS, A WRIT OF ERROR LIES.

A writ of error lies only after judgment, and only on a judgment, or an award in the nature of a judgment.³ But the errors which render the judgment bad, and liable to be reversed, may occur in any stage of the proceedings of the cause, that is, "in the foundation, proceedings, judgment, or execution, of the suit."

But whatever the error be, and in whatever stage of the case it occur, it must appear *upon the record*, in order that a writ of error may be sustained, by the party thinking himself aggrieved thereby. And if the matter complained of do not necessarily appear on the record, the party contemplating a writ of error,

¹ *Hemmenway et al. v. Hicks et al.* 4 Pick. Rep. 497.

² *Savage v. Gulliver*, 4 Mass. Rep. 171. *Putnam v. Churchill*, 4 Mass. Rep. 516. *Jarvis v. Blanchard*, 6 Mass. Rep. 4.

³ *Droune v. Stimpson*, 2 Mass. Rep. 441.

should cause it to appear there, by filing exceptions, or requesting a special verdict.¹

Within this rule, it is holden, that neither the report of the judge of the evidence and proceedings in a trial, — nor the reasons given for the opinion of the court, — nor the papers and documents filed in the case, — nor papers filed in support of the plaintiff's action, or to prove his damages, after a default, are a part of the record, so as to sustain a writ of error, to reverse the judgment; but that if either party be aggrieved by the opinion, or by the admission of the evidence, he must file exceptions.²

And in one case,³ where the party aggrieved had neglected to cause the matter complained of, to appear upon the record, it was said by the court, that his only remedy was by petition for a new trial.

The error, for which a judgment may be reversed by writ of error, — if it thus appear on the record, — may be either in the *foundation, proceedings, judgment, or execution*, of the suit.

1. *In the foundation of a suit.* If a writ of review be sued out as of right, by a party not entitled to it, the judgment therein may be reversed on writ of error.⁴

Error lies on a judgment rendered on a promise made upon an illegal consideration, if the illegality appear upon the face of the declaration.⁵

¹ *McFadden v. Otis*, 6 Mass. Rep. 323. *Coolidge v. Inglee*, 13 Mass. Rep. 50. *Storer v. White*, 7 Mass. Rep. 448. *Pierce v. Adams*, 8 Mass. Rep. 383. *Gerrish v. Morss*, 2 Pick. Rep. 625.

² *Ibid.*

³ *Peirce v. Adams*, 8 Mass. Rep. 383.

⁴ *Hall v. Wolcott*, 10 Mass. Rep. 218.

⁵ *Stotesbury v. Smith*, 2 Burr. Rep. 924.

If a husband bring a separate action for an injury done to the wife, where the wife might have joined in the action, a judgment therein will not be erroneous, because such judgment would be a good bar to a joint action by the husband and wife, for the same cause.¹

2. *In the proceedings of a suit.* If an action against a defendant who is out of the Commonwealth, be not *continued*, as required by *Stat. 1797. ch. 50.* but judgment be rendered at the first term, the judgment will be erroneous.²

So if in an action against an infant, judgment on default be rendered against him, without a *guardian having been appointed*,³ or in an action against a person *non compos, without notice to his guardian*,⁴ in either case, the judgment will be erroneous.

If the *declaration*, in an action in which a defendant has been defaulted, be insufficient, the judgment may be reversed on writ of error.⁵

Where, upon a default, damages are assessed generally on all the counts in the declaration, and one of them would be bad on general demurrer, the judgment must be reversed;⁶ so also, after a verdict and general damages, unless the verdict can be amended by the certificate of the judge, so as to shew that the damages were assessed on the good counts only.⁷

If the *service* of a writ be made by an officer, not

¹ *Southworth v. Packard*, 7 Mass. Rep. 95.

² *Blanchard v. Wild*, 1 Mass. Rep. 342. *Bullard v. Brackett*, 2 Pick. Rep. 85.

³ *Knapp v. Crosby*, 1 Mass. Rep. 479.

⁴ *White v. Palmer*, 4 Mass. Rep. 147.

⁵ *Perry v. Goodwin*, 6 Mass. Rep. 498.

⁶ *Hemmenway et al. v. Hicks et al.* 4 Pick. Rep. 497. *Dryden v. Dryden*, 9 Pick. Rep. 546.

⁷ *Ibid.*

authorized by law to make it, — as if the writ, in a real action, be served by a constable, — the judgment thereon may be reversed on writ of error.¹

So also if *no service* have been made.²

An omission to enter *continuances* upon the docket, so as to bring the case forward from term to term, is not a sufficient ground to sustain a writ of error,³ but it will be considered as the omission of the clerk.

If a mistake be made in the *taxation of costs*, and judgment be rendered thereon, error lies;⁴ — but not because the *items* of cost do not appear,⁵ — nor for *excessive costs*.⁶

Error does not lie, for a mistake in *computing interest* upon the demand in suit.⁷ The party aggrieved should petition for a new trial.

If the *verdict* do not find the issue joined, the judgment thereon may be reversed on writ of error.⁸ But a *neglect to join the issue tendered*, will not make the judgment on the verdict erroneous.⁹

And it has been holden, that an *erroneous verdict* may be amended by the minutes of the judge, after writ of error brought.¹⁰

¹ *Hart v. Huckins*, 5 Mass. Rep. 260. *Same v. Same*, 6 Mass. Rep. 399. *Thatcher et al. v. Miller*, 11 Mass. Rep. 413. *Same v. Same*, 13 Mass. Rep. 270.

² *Whiting v. Cochran*, 9 Mass. Rep. 532.

³ *Ex parte Weston et al.* 11 Mass. Rep. 417.

⁴ *Field v. First Mass. Turnpike Co.* 5 Mass. Rep. 329. *Waite v. Garland*, 7 Mass. Rep. 453. *Thomas v. Sever*, 12 Mass. Rep. 379.

⁵ *Southworth v. Packard*, 7 Mass. Rep. 95.

⁶ *Ex parte Weston et al.* 11 Mass. Rep. 417.

⁷ *Whitwell v. Atkinson*, 6 Mass. Rep. 272.

⁸ *Brown v. Chase*, 4 Mass. Rep. 436. *Clark v. Lamb*, 6 Pick. Rep. 512.

⁹ *Whiting v. Cochran*, 9 Mass. Rep. 532.

¹⁰ *Petrie et al. v. Hannay*, 3 Term. Rep. 659. *Clark v. Lamb*, 6 Pick. Rep. 512.

In proceedings under a *rule of reference*, entered into before a justice of the peace, the requisites of *Stat. 1786. ch. 21.* regulating such proceedings, must be strictly pursued, in the submission, and in making the report. And unless such requisites are complied with, the judgment, rendered upon the report, will be erroneous.

Thus where the reference was to *two* referees, instead of *three*,¹ — where a particular statement of the demand in writing was not made,² — or was not signed by the party making it,³ — where it did not appear upon the record, that *all* the referees heard the parties, either by all signing the award, or by a certificate on the award, signed by any one, who did not concur, which is the usual course where there is a disagreement, stating that he was present at the hearing, but did not agree in opinion with the other referees,⁴ — where the referees did not make their report to the *next* Court of Common Pleas, *after* the award was agreed upon, but made it at a court, which was in session, at the time the award was agreed upon,⁵ — or after an intervention of several terms,⁶ — and where the referees exceeded their authority, by taking into consideration demands not legally submitted to them,⁷ —

¹ *Monosiet v. Post*, 4 Mass. Rep. 532.

² *Jones v. Hacker*, 5 Mass. Rep. 264.

³ *Mansfield v. Doughty*, 3 Mass. Rep. 398. But vide *Humphry v. Strong*, 14 Mass. Rep. 262, — that it is sufficient that the demand be in the *hand-writing* of the party, though not actually signed by him, — and *Skillings v. Coolidge et al.* 14 Mass. Rep. 43, — that it is sufficient for a partnership demand to be signed by one partner.

⁴ *Short v. Pratt*, 6 Mass. Rep. 496.

⁵ *Durell v. Merrill*, 1 Mass. Rep. 411.

⁶ *Mott v. Anthony*, 5 Mass. Rep. 489. *Southworth v. Bradford*, 5 Mass. Rep. 524. *Bacon v. Ward*, 10 Mass. Rep. 141.

⁷ *Tudor v. Peck*, 4 Mass. Rep. 242.

in all these cases, the judgments rendered on the reports, were, for the several errors, reversed on writ of error.

But a judgment on a report of referees will not be erroneous, because it does not appear that a demand, within the terms of the submission, had not been decided upon by the referees; for the demand might not have been laid before them, in which case, the award would be no bar to an action on such demand.¹

3. *In the judgment.* By a writ of error, an erroneous judgment on an original writ, may be corrected. Thus error lies on a *scire facias* on a former judgment, — or against executors or administrators, — or against bail, — or against the indorser of a writ.²

If the judgment in a case, do not follow the verdict, it may be reversed on error.³

If judgment be rendered for a sum greater than the *ad damnum*, the judgment may be reversed.⁴ But if a *verdict* be found for a greater sum, the plaintiff may take judgment for the amount of the *ad damnum*, and release the residue.

And it is now settled, that the plaintiff may enter a *remittitur*, after judgment, and even at the next term after judgment.⁵ In a case in England, it was allowed to be entered, even after writ of error brought, upon payment of the costs of the writ of error.⁶ And an

¹ *Webster v. Lee*, 5 Mass. Rep. 334. *Hodges v. Hodges*, 9 Mass. Rep. 320.

² *Johnson v. Harvey*, 4 Mass. Rep. 483.

³ *Holmes v. Wood*, 6 Mass. Rep. 1. *Porter v. Rummery*, 10 Mass. Rep. 64.

⁴ *Grosvenor v. Danforth*, 16 Mass. Rep. 74.

⁵ *Hemmenway et al. v. Hicks et al.* 4 Pick. Rep. 497.

⁶ *Pickwood v. Wright*, 1 H. Black. Rep. 642.

erroneous verdict, in this state, was allowed to be amended, after writ of error brought.¹

A writ of error lies, as has been already stated,² upon a judgment rendered upon a report of referees, for mistakes in the *proceedings*. So if the judgment of a court, on the acceptance of the report, do not conform to the award, it may be reversed on writ of error.³

If judgment be rendered upon a report of referees, for a less sum than that awarded by them, it will not be reversible for error on that account, if the prevailing party release the difference, on the record.⁴

Error lies to the Court of Common Pleas, where they dismiss an action without trial, which was brought from a justice by appeal; and a trial will be had at the bar of the Supreme Judicial Court, upon the issue joined before the justice.⁵

A judgment in an action brought upon a former judgment, which was erroneous, cannot be reversed for such error in the first judgment.⁶ The only remedy in such a case is, to reverse the former judgment by writ of error, and then petition for a review of the second action.

If the record of a judgment, though defective in itself, refer to the declaration in the writ, for the cause of action, parties, &c. the court will consider the

¹ *Clark v. Lamb*, 6 Pick. Rep. 512.

² Vide ante page 469.

³ *Nelson v. Andrews*, 2 Mass. Rep. 164. *Commonwealth v. The Pejepscut Prop.* 7 Mass. Rep. 399.

⁴ *Phelps v. Goodman*, 14 Mass. Rep. 252.

⁵ *Keen v. Turner*, 13 Mass. Rep. 265.

⁶ *Hawes v. Hathaway*, 14 Mass. Rep. 233.

declaration, so far a part of the record of the judgment, as to save error.¹

Where a judge, at one term allowed and signed exceptions to his opinion, and at the next term, deeming the exceptions frivolous, entered judgment and awarded execution, it was holden that the party aggrieved must resort to a writ of error.²

If in an action on a probate bond, judgment be rendered, that executions be awarded against the defendant, for the use of the *legatees*, *creditors*, or *heirs*, without there being any decree for their payment, or any judgment of any court ascertaining them, the judgment in awarding executions, will be erroneous.³

4. *In the execution.* A writ of error will lie to set aside an execution, sued out on a statute merchant, or staple, duly acknowledged. And by analogy, it will lie upon an execution sued out on a *recognizance* for the payment of a debt, taken before a justice of the peace, agreeably to *Stat. 1782. ch. 21*.⁴

But where there is a regular judgment, and a regular award of execution, a writ of error will not lie for an irregularity in the issuing of the execution, — as if an execution be taken out against a defendant who is out of the Commonwealth, without a bond being given, pursuant to statute.⁵

¹ *Clap v. Clap*, 4 Mass. Rep. 520.

² *Brown v. Bull*, 3 Mass. Rep. 211.

³ *Glover v. Heath*, 3 Mass. Rep. 252. *Dawes v. Head et al.* 3 Pick. Rep. 128.

⁴ *Johnson v. Harvey*, 4 Mass. Rep. 483.

⁵ *Ibid.*

SECT. IV. PARTIES TO A WRIT OF ERROR.

1. *By whom a writ of error must be brought.* A writ of error is usually brought by the party or parties, against whom the judgment was given. But it may be brought by a plaintiff, to reverse his own judgment, if he be dissatisfied with it, in order that he may be enabled to bring a new action.¹

It is a general rule, that no person can bring a writ of error to reverse a judgment, unless he was a party or privy to the record in the suit, wherein the judgment was rendered, or was injured by the judgment, and who, consequently, will derive advantage from its reversal.

If there be a single party, therefore, against whom the judgment is given, a writ of error may be brought by him alone, and in case of his death, by his heirs,² or his executors or administrators, according as the judgment affects real or personal property.

And, it is presumed, that within *Stat. 1817. ch. 190. s. 18.* an administrator *de bonis non* may bring a writ of error, to reverse a judgment recovered either by or against a former executor or administrator, though, before the passing of the statute, it had been decided that he could not, for want of privity.³

Where there are several, against whom the judgment complained of was rendered, any writ of error thereon must be brought in the names of all of them, if living; and if any of them be dead, they

¹ *Johnson v. Jebb*, 3 Burr. Rep. 1772. 2 Saund. 101d. note.

² 2 Saund. 46. note 6.

³ *Grout v. Chamberlain*, 4 Mass. Rep. 611.

must still be named, and their death alleged in the writ.¹ If this be omitted, and the writ be sued out in the name of a part only of the parties, it will be quashed.²

This rule applies in all cases, even though some of the parties should not desire to bring a writ of error, but are willing to submit to the judgment. All must be named in the writ; and the course in such a case, where some will not prosecute the writ is, after the return of the writ, and before the assignment of errors, to have a *summons and severance*, that is, a *summons* to those who do not appear and join in the writ, to come in and do so; and if they do not, they are then *severed*, and the writ is prosecuted by the remaining parties.³

If a judgment against a wife be erroneous, the husband and wife must join in a writ of error to reverse it, whether the judgment be rendered against her, before or after marriage;⁴ and if the writ be brought by her alone, it will be quashed.⁵

But if in a suit against several, judgment be in favor of part, and against part, those aggrieved must sue out their writ alone; for they in whose favor judgment was given, cannot say that they were aggrieved thereby.⁶ The writ, however, in such a case, must describe the record as it really is, including all the parties, but

¹ *Brewer v. Turner*, 1 Stra. Rep. 233. *Cooper v. Ginger*, 1 Stra. Rep. 606. 2 Saund. 101d. note. *Shirley v. Lunenburgh*, 11 Mass. Rep. 379.

² Ibid. *Andrews et al. v. Bosworth*, 3 Mass. Rep. 223.

³ Yelv. 4. 2 Saund. 101d. note.

⁴ Sty. 254, 280. *Haines v. Corliss*, 4 Mass. Rep. 659.

⁵ *McNamara v. Fisher*, 8 Term. Rep. 302.

⁶ 1 Lev. 210. Hob. 70.

alleging the error to be, to the damage of those who bring the writ.¹

So where there are several persons *privy* to a judgment, each having a distinct and several interest, each will be entitled to a separate writ of error, and to maintain it by himself; and this, notwithstanding a release by any other having a like privy in the same judgment, by a distinct interest. Thus, in a judgment in a real action, the heir or devisee of a party, as well as the executor or administrator, may have several and distinct interests, and each be entitled to a writ of error.²

2. *Against whom a writ of error must be brought.* The general rule is, that a writ of error must be brought against him only, who was party or privy to the first judgment; and, in case of his death, against his heirs, or executors or administrators, according to the nature of the action in which the judgment was rendered.

In case of the death of the original party, against whom the writ of error is intended to be brought, every person interested in the judgment, though not a party to the original suit, must be named in the writ, and have notice of it. Thus, if a party to a judgment in a real action have deceased, those entitled at his decease, by descent, or devise from him, have a privy by their interest, in the principal subject of the judgment, and must be named in a writ of error brought to reverse it, as well as the executor or administrator, whether they be tenants of the land or not; and if

¹ *Lady Cass v. Title*, 1 Stra. Rep. 682.

² *Porter v. Rummary*, 10 Mass. Rep. 64. *Shirley v. Lunenburgh*, 11 Mass. Rep. 379.

another than the heir or devisee, be tenant of the land, he also ought to be named in the writ.¹

Where there are a number of defendants, the rule is the same as that relating to plaintiffs, in a writ of error, and all should be named in the writ.²

So when a writ of error is brought to reverse a judgment upon a probate bond, against the original defendant, the names of all the persons, whose names were indorsed on the original writ, and for whose use executions were awarded, should be inserted in the *scire facias* to hear errors.³

SECT. V. PROCEEDINGS IN SUING OUT A WRIT OF ERROR.

A writ of error, as has been already stated, is a writ of right, and may be sued out, without motion.⁴

Time of suing out. By Stat. 1805. ch. 35. no judgment in any action, shall be reversed or avoided, for any error or defect therein, unless the writ of error brought for reversing the same, be sued out within *twenty years* after the rendition of such judgment; *provided*, that if any person entitled to such writ of error shall, at the time such title accrued, be within the age of twenty-one years, *covert*, or *non compos mentis*, then such person, his heirs, executors or administrators, notwithstanding said twenty years may have expired, may bring a writ of error to reverse such judgment, within *five years* after such disabilities cease, or after the death of such person.

¹ *Porter v. Rummery*, 10 Mass. Rep. 64.

² *Knox v. Costello*, 3 Burr. Rep. 1789.

³ *Glover v. Heath*, 3 Mass. Rep. 252.

⁴ Vide ante page 460.

Absence from the country is not named in this proviso.

It has been holden, that a disability, to bring a party within this proviso, must be one existing at the time the title to the writ accrued.¹

Mode of suing out. At any time within the statute of limitations of a writ of error, the party intending to sue out a writ, should file in the clerk's office of the Supreme Judicial Court, in the county where the judgment complained of was rendered, an assignment of errors to the judgment, naming therein the *court*, and *term*, and *case*, in which the judgment was given, — stating his desire that a writ of error should issue, — and specifying the errors, by which he deems himself aggrieved.²

This assignment of errors should be filed before the issuing of the writ, because it is either inserted in the *scire facias* to the defendant, or referred to therein, as being on file.

The *process* is then issued from the clerk's office, and consists,

First. Of the writ, which, *tested* by the Chief Justice of the Supreme Judicial Court, — under *the seal* of that court, — bearing *date*, the day it issues, — and in the form of a *mandamus*, is directed to the Chief Justice, — or to the judge, if there be but a single one, — of the court, in which the judgment complained of was rendered, commanding him to send the record and process of the suit, “together with

¹ *Eager & ux. v. Commonwealth et al.* 4 Mass. Rep. 182.

² Vide a form of an *assignment of errors*, in note A. at the end of this Chapter.

this writ," to the Supreme Court, at a specified term.¹ And,

Second. Of the *scire facias ad audiendum errores*, which, — *tested, sealed, and dated*, in the same manner as the writ, — is directed to a sheriff or his deputy, commanding them, to make known to the defendant in error, to appear before said Supreme Judicial Court, at a specified term, to hear the errors, and shew cause, &c.²

The *writ* and *scire facias*, are both made returnable at the same term of the Supreme Court; and, it is presumed, they should be made returnable at the next term after issuing, consistent with allowing a sufficient number of days for service.

A writ of error must issue in the county, where the judgment was rendered.³ And though *it seems* to have been decided in an early case, that it may be returned and determined, in a county other than that, in which the original judgment was rendered, yet it is presumed that the rule is, that it should be made returnable in the same county, in which it issues.⁴

As the allowance of a writ of error, in the English practice, operates as a *supersedeas* of the execution, the plaintiff in error must, previous to the issuing of the writ, give bail by recognizance, with two sufficient sureties, to prosecute his writ, and to satisfy the judgment, if affirmed, and all damages that may be awarded for delaying the execution.⁵

¹ Vide a form of a *writ of error*, in note A. at the end of this Chapter.

² Vide a form of a *scire facias ad audiendum errores*, in note A. at the end of this Chapter.

³ *Smith v. Franklin et al.* 1 Mass. Rep. 480. *Pembroke v. Abington*, 2 Mass. Rep. 142.

⁴ *Ibid.*

⁵ 2 Tidd's Pract. 1105. *Jaques v. Nixan*, 1 Term. Rep. 280. *Gravall v. Stimpson*, 1 Bos. & Pul. Rep. 478. 1 Arch. Pract. 245.

But with us, the writ is issued without motion, and its issuing does not operate as a *supersedeas* in any case, as a matter of course. No bail, therefore, is here required to be given by the plaintiff in error.

But though the suing out the writ, does not operate as a *supersedeas*, in our practice, yet the court may in any case, on motion by the plaintiff, and upon reasonable ground being shewn, issue a *supersedeas*; in which case, the plaintiff must give a sufficient bond to the defendant, upon the same conditions, and for the same purposes, as the recognizance in error, in England.¹

How and by whom served. No particular form of service of the *writ* upon the judge, to whom it is directed, is required. It is generally, merely delivered to him, by the attorney of the plaintiff in error.

The *scire facias* must be served on the defendant in error, by the officer to whom it is addressed, in the same manner as any other *scire facias*.

Time of service. There is no specified time before the return day of the *writ*, within which the writ must be delivered to the judge, to whom it is directed. It should be done, however, within a sufficient time, before the return day, to enable him to have a transcript of the record prepared.

As to the service of the *scire facias*, it is presumed, that the same rules apply, as to the time between the service and return, as in other writs.²

How and where returned. The *writ*, with a transcript of the record of the suit therein named annexed, and with a written return indorsed thereon by the

¹ *Bailey v. Baxter*, 1 Mass. Rep. 156.

² Vide ante Book I. Chap. X. Sect. II.

judge, under his seal,¹ is by him returned to the clerk's office, of the Supreme Court, at the specified time.

The officer returns the *scire facias*, with his doings thereon, in the same manner as in other cases.

SECT. VI. ASSIGNMENT OF ERRORS.

When to be made and filed. The assignment of errors should properly be filed in the clerk's office, before the issuing of the writ and *scire facias*, though there is no rule positively preventing the issuing of the writ and *scire facias*, previously to the filing of the assignment of errors.

If the assignment of errors be so filed, it may be inserted in the *scire facias*; in which case, the defendant will be holden to plead thereto, within the first *two days* of the return term, unless the court, by special order, enlarge the time;² and a decision may be had at the first term.³

The plaintiff would, at any rate, be holden to assign his errors within a reasonable time, after the return of the writ.

If the plaintiff neglect to assign his errors at the proper time, the defendant, in the English practice, may sue out a writ of *scire facias quare executionem non*, or give the plaintiff a rule to assign errors.⁴ Here, however, such a writ is not used; but in such a case of neglect on the part of the plaintiff, the

¹ See a form of the judge's return of the writ, in Note A, at the end of this Chapter.

² Reg. Gen. S. J. C. 42. Appendix A.

³ *Pembroke v. Abington*, 2 Mass. Rep. 142.

⁴ 1 Arch. Pract. 270. 2 Tidd's Pract. 1138.

court would dismiss the writ, and supersede any *supersedeas*, that might have been granted.

What errors may be assigned. An assignment of errors is in the nature of a declaration,¹ — and is either of *errors in fact*, or *errors in law*.

1. *Errors in fact.* These consist of matters of fact, not appearing upon the face of the record, which, if true, prove the judgment to have been erroneous; as that the defendant in the original action, being an infant, appeared by attorney; — that a *feme* plaintiff or defendant was under coverture, at the time the action was commenced; — that a sole plaintiff or defendant died before judgment; — or that the defendant was out of the Commonwealth, at the time of the service of the writ, and did not return before the entry of the action, and that it was defaulted at the first term.²

2. *Errors in law.* These are of two kinds, *common* or *special*.

The *common errors in law* are, that the declaration is insufficient in law, to support the judgment, and that the judgment was rendered for the plaintiff, instead of the defendant, or *vice versâ*.³

Special errors in law, are some particular individual defects, apparent on the record, which are specially referred to by the plaintiff in error, and which shew the judgment to have been erroneous.⁴

The plaintiff may assign several errors in law, but only one error in fact;⁵ and he cannot assign error in

¹ 2 Bac. Abr. 216.

² *Blanchard v. Wild*, 1 Mass. Rep. 342.

³ 2 Tidd's Pract. 1140.

⁴ *Ibid.*

⁵ *Ibid.* F. N. B. 20.

fact and law together; for these are distinct things, one to be tried by the court, and the other by the jury.¹

Nothing can be assigned for error, which contradicts the record,² — or was for the advantage of the party assigning it,³ — or that is aided by appearance, or by not having been taken advantage of in due time.⁴ But if the error be the default of the court, though it be for the advantage of the party, yet it may be assigned, for the course of the court ought to be observed.⁵ So a plaintiff may assign for error, the want of jurisdiction in a court of limited jurisdiction, to which he has chosen to resort.⁶

As to the assignment, whether it must be *general* or *special*, this distinction seems to be taken. The *common* errors may be assigned, if the errors complained of appear upon the face of the record itself; or if in such case, any of these errors be assigned *especially*, counsel will not be confined, in arguing the case, to the errors thus assigned, but may support the writ of error, by any other error appearing on the face of the record. But it is usual, if there really be errors in the record, to assign one of them *especially*. Where, however, the error is in any of the outbranches of the record, as where there is no writ, or a bad one, it must be assigned *especially*, and the diminution alleged, and verified by *certiorari*,

¹ 2 Bac. Abr. 217. 2 Ld. Ray. Rep. 883. *Jeffry v. Wood*, 1 Stra. Rep. 439.

² 2 Bac. Abr. 218. *Helbut v. Held*, 1 Stra. Rep. 684.

³ Ibid.

⁴ Ibid. 2 H. Black. Rep. 267, 299.

⁵ Ibid. *Capron v. Van Noorden*, 2 Cranch. Rep. 126. Yelv. 107.

⁶ Ibid. 2 Tidd's Pract. 1142.

which the court will grant, in order to bring up the whole record.¹

If there be several plaintiffs in error, they must all join in the assignment of errors, unless some of them have been summoned and severed.²

An assignment of *errors in fact*, should conclude with a verification, though this position is questioned in some of the books.³

But in assigning the death of the defendant in error, the assignment ought not to conclude in the common way, but by praying a *scire facias ad audiendum errores*, against the executor or administrator.⁴

SECT. VII. PLEADINGS IN ERROR.

To an assignment of errors, the defendant may *plead*, or *demur*.

Pleas in error are *common* or *special*. The *common* plea, or *joinder*, as it is more commonly called, is, “*in nullo est erratum*,” or that there is no error in the record or proceedings; and this is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court.

If the plaintiff in error assign an error in fact, and the defendant in error would put in issue the truth of it, he ought to traverse or deny the fact, and so join issue thereupon; and not plead “*in nullo est erratum*,” for by so doing, he would acknowledge the fact alleged, to be true.⁵

¹ 1 Arch. Pract. 251. *Andrews et al. v. Bosworth*, 3 Mass. Rep. 223.

² 1 Arch. Pract. 251.

³ 1 Burr. Rep. 410. Carth. 367. Yelv. 58. *contra*.

⁴ 1 Sid. 93. Ld. Ray. 59. S. C.

⁵ Yelv. 57.

But in such a case, if the defendant be willing to acknowledge the fact to be as alleged, but insists that by law it is not error, he ought to plead "*in nullo est erratum*."¹

If an error in fact, therefore, be *well* assigned, "*in nullo est erratum*," confesses it; for the defendant ought to have joined issue on it, so as to have it tried by the country; but if an error in fact be assigned, that is not assignable, or be *ill* assigned, "*in nullo est erratum*," is no confession of it, but shall be taken only for a demurrer.²

If error be alleged of the body of the record, "*in nullo est erratum*," is a good rejoinder; for this puts the matter in the judgment of the court, the record being agreed to be as stated.³ So if error be alleged in a matter of record, which is not in the body of the record, but in a collateral thing, "*in nullo est erratum*," is a good rejoinder.⁴

But if the plaintiff in error assign error in *fact*, and error in *law* together, which, we have seen, cannot be assigned together, the defendant in error must not plead "*in nullo est erratum*," for this would confess the error in fact, and the judgment must be reversed; but he must *demur* for the duplicity, upon which the judgment will be affirmed.⁵

The demurrer, in this case, however, need not be *special*; for writs of error are not within the statute, requiring demurrers for duplicity to be *special*.⁶

¹ 1 Rol. Abr. 758.

² 2 Bac. Abr. 218.

³ 1 Rol. Abr. 763.

⁴ Ibid, 764.

⁵ 2 Ld. Ray. 883. 2 Bac. Abr. 218. Carth. 328.

⁶ Ibid.

By pleading "*in nullo est erratum*," the defendant in error admits the record to be perfect, the effect of his plea being, that the record, in its present state, is without error;¹ and, therefore, after this plea, neither party can allege diminution, or pray a *certiorari*.² The court, however, are not restrained thereby, from looking into the record; but they may, at any time pending a writ of error, either before or after the assignment of errors, and even after "*in nullo est erratum*," pleaded, *ex officio* award a *certiorari*, to supply a defect in the body of the record, or in its outbranches.³

Special pleas to an assignment of errors, contain matter in confession and avoidance, — as a release of errors,⁴ — or the statute of limitations, to which the plaintiff may *reply* or *demur*, and proceed to trial or argument.

Where there are several plaintiffs in error, the release of one, will not be a bar to the others.⁵

Special pleas in bar to a writ of error, should conclude by praying that the plaintiff may be barred of his writ of error, and not that the judgment be affirmed, for they admit the judgment to be erroneous.⁶

An issue having thus been joined in error, the proceedings are entered of record. If the issue be one of *fact*, the parties proceed to trial to the jury, as in the Court of Common Pleas; if *of law*, the action is

¹ 1 Salk. 270.

² Ibid, 269. 2 Cowen. Rep. 408.

³ Ibid. 2 Ld. Ray. 1005. 2 Tidd's Pract. 1152.

⁴ 2 Bac. Abr. 225.

⁵ 6 Co. 25a. Cro. E. 648.

⁶ *Cunningham v. Houston*, 1 Stra. Rep. 127. *Dent v. Lingood*, 1 Stra. Rep. 683. *Street v. Hopkinson et al.* 2 Stra. Rep. 1055. 1 Arch. Pract. 256.

entered on the law docket of the Supreme Court, and comes on for hearing in its order.

SECT. VIII. JUDGMENT, &C. IN ERROR.

Judgment. The judgment in error is, either to *affirm*, — or to *recall*, — or to *reverse* the former judgment, — or *that the plaintiff be barred of his writ of error*, — or *that there be a new trial*.¹

1. *For the defendant in error.* The common judgment for the defendant in error, whether the errors assigned be in fact or in law is, that the former judgment be *affirmed*.²

So on a *demurrer* by defendant, to an assignment of errors in fact and law, for duplicity, the judgment is, that the former judgment be *affirmed*.³

On a *plea* of release of errors, or the statute of limitations, found for the defendant, the judgment is, *that the plaintiff be barred of his writ of error*.⁴

2. *For the plaintiff in error* When the judgment is for the plaintiff in error, if the error be *in fact*, the former judgment is *recalled*: — if the error be *in law*, the former judgment is *reversed*.⁵

If the plaintiff in error be the original *defendant*, against whom judgment was given, the judgment in error, when for him, shall be simply to *reverse* the former judgment; for the writ of error is brought only to be discharged from that judgment.

¹ 2 Tidd's Pract. 1161.

² Ibid.

³ Ibid. Yelv. 58. *Jeffry v. Wood*, 1 Stra. Rep. 439.

⁴ 1 Stra. Rep. 127, 683. 2 Stra. Rep. 1055.

⁵ 1 Rol. Abr. 805. pl. 9. 2 Bac. Abr. 230.

But if the plaintiff in error be the original plaintiff, against whom judgment was given, if he prevail in error, the judgment will not only be reversed, but the court will also give such judgment, as the court below should have given,¹ and if necessary, award a writ of inquiry, to assess the damages.²

A new trial is granted, when error is brought upon a bill of exceptions, taken and filed, to the opinion of the judge, who tried the cause, where such direction is wrong, — and in many other cases, where error has occurred in the course of the proceedings, which may be corrected on a new trial.³

A judgment being an entire thing, cannot regularly be reversed for part, and affirmed for the residue. Thus where *several* damages were given on two issues and an *entire* judgment was rendered for both, and one of the issues was erroneous, the judgment was reversed for the whole.⁴

So if in an action against several, one judgment be given against all, and upon error, it be holden that the judgment is erroneous as to one, it shall be reversed against all.⁵

So if there be several dependent judgments, and the principal one be reversed, the others cannot be supported; — as if one recover in debt or *scire facias*, on a judgment, and the first judgment be reversed, the judgment in debt or *scire facias* is reversed also. But

¹ *Parker v. Harris*, 1 Salk. 262. 2 Saund. 110.

² Ibid. Yelv. 76a. *Cuming v. Sibley*, 4 Burr. Rep. 2490.

³ 2 Tidd's Pract. 825, 1161. *Crossen v. Hutchinson*, 9 Mass. Rep. 205. *Witter v. Witter*, 10 Mass. Rep. 223.

⁴ Cro. Jac. 424. *Porter v. Rummery*, 10 Mass. Rep. 64.

⁵ Roll. Abr. 776. Sty. 121, 125, 406. 14 Johns. Rep. 417.

if merely the last judgment be reversed, this does not affect the first.¹

Where there are several distinct and independent judgments, the reversal of one will not affect the others.²

So also, though there be but one judgment, yet if it consist of several distinct and independent parts, and though one part be erroneous, yet it can be set right, without a reversal of the whole, it may be reversed for one part, and remain good for the remainder; as for costs alone,³ — or damages in *scire facias*,⁴ — or for damages and costs in a *qui tam* action.⁵

So on a writ of error, a judgment may be reversed as to the damages, and affirmed as to the costs.⁶ — So a judgment in a *trustee process* may be reversed as to the trustee, and remain good against the principal.⁷

Execution. The execution issues in favor of the prevailing party, from the Supreme Court, and in common form, — the record being supposed to be in that court, though, in fact, a transcript only is sent.⁸

3. Costs. For costs on a writ of error, see Chapter on Costs.

¹ 2 Ld. Ray. 1532. 2 Stra. Rep. 807.

² Ibid. 2 Bac. Abr. 228.

³ *Bellew v. Aylmer*, 1 Stra. Rep. 188. 5 Cowen. Rep. 654. 8 Johns. Rep. 566.

⁴ 2 Stra. Rep. 808.

⁵ 4 Burr. Rep. 2018.

⁶ *Cummings v. Pruden*, 11 Mass. Rep. 206.

⁷ *Whiting v. Cochran*, 9 Mass. Rep. 532.

⁸ Cowp. 841.

NOTE A.

Form of an *Assignment of Errors*.
Supreme Judicial Court.

ss.

Plaintiff in error vs.

Defendant.

On a judgment of the Court begun and holden at
within and for the county of on the day of
wherein the said of , is plaintiff, and the said
of , is defendant.

And the said prays for a writ of error to issue, returnable
to the next Supreme Judicial Court, to be holden at , within
and for the county of on the and assigns for
errors in the record of the process and judgment aforesaid, the following,
to wit:

By his Attorney,

A. B.

Form of a *Writ of Error*.
Commonwealth of Massachusetts.

L. S.

ss.

To our trusty and well beloved
our Court for the

Chief Justice of

Greeting.

Because in the record and proceedings, and also in the rendition of
judgment, between of , plaintiff, and
of , defendant, in an action, that was in our court,
held at , on , manifest error hath happened, as
it is said, to the great damage of the said , as by his com-
plaint we are informed,

We, willing that the error, if any hath been, should be duly amended,
and full and speedy justice done therein to the said parties, do command
you, that if judgment be therein rendered, you distinctly and openly
send us the record and process of the suit aforesaid, with all things
touching them, under your seal, together with this writ,—so that we
may have them, before our justices of our Supreme Judicial Court, to
be held at within and for the county of , on the
of , that inspecting the record and process afore-
said, we may, for correcting that error therein, further cause to be done
what of right and according to law, shall be to be done.

Witness.

Esq.

at , this day of

Clerk.

Judges return thereon.

L. S.

ss.

Pursuant to the precept of this writ, to me directed, I herewith send the record and process of the suit, and process within mentioned, with all things touching the same, all which are hereunto annexed, to the Honorable the Justices of the Supreme Judicial Court within named.

In testimony whereof, I hereunto put my hand and seal this
day of

Chief Justice, &c.

Form of a *Scire Facias ad audiendum errores*.
Commonwealth of Massachusetts.

L. S.

ss.

To the Sheriff of our county of _____ or his Deputy,
Greeting.

Whereas at the complaint of _____ of _____, a certain plea of the case prosecuted at a court _____ holden at _____ in and for our county of _____, on the _____ by _____ of _____ against _____ of _____, together with the proceedings and judgment therein are, by our writ of error, ordered to be removed into our Supreme Judicial Court next to be holden at _____ on _____:— and whereas the said _____, by his attorney, hath assigned errors, and filed the same, which now remain in the clerk's office of the Supreme Judicial Court, said to have happened on the said complaint, and in the said proceedings and judgment. We therefore command you, willing that justice should be done in the premises, that you *make known* unto the said _____, that he appear, (if he see cause,) before our Supreme Judicial Court, to be holden at _____, within and for the county of _____ on the _____, to hear the errors aforesaid, and to shew cause (if any he hath) why the said error (if any be) should not be corrected as to justice appertains. Hereof fail not, and have you there this writ, with your doings therein.

Witness.

Esq.

at _____, the _____ day of _____

Clerk.

CHAPTER XIV.

CERTIORARI.

A *certiorari* is a writ issuing from a superior, and directed to the judges of an inferior court, commanding them to certify and return their records of a cause. At common law, this writ is resorted to, for various purposes; but in this state, its only object is, the correction of errors in certain cases, committed by the inferior tribunals. It differs from a writ of error, — in the nature of the cases, to which it applies, — in the mode, in which it is granted, — and in the judgment rendered.

From what court it issues. A writ of *certiorari*, in this state, can issue from the Supreme Judicial Court only.

Cases in which it lies. A writ of *certiorari* is the appropriate remedy for the correction of errors, committed by inferior courts, who either have no common law jurisdiction, or whose proceedings, in the particular cases, are not according to the course of common law; for, in these cases, a writ of error will not lie.¹ A *certiorari* lies, therefore,

1. In all proceedings before the former court of sessions, — now the *county commissioners*, in laying out highways.²

2. In proceedings in the *Court of Common Pleas*,

¹ *Commonwealth v. Ellis*. 11 Mass. Rep. 462.

² *Commonwealth v. Coombs*, 2 Mass. Rep. 489.

on complaints by the owners of lands, flowed by mill-dams;¹ — and on complaints against the putative father of a bastard child.²

3. In proceedings before a *justice of the peace*, on complaints for neglect of military duty;³ — and on *references*, entered into before a justice of the peace.

In proceedings on complaints, before a justice, for the violation of the law of the road prescribed by *Stat.* 1820. *ch.* 65. and on appeals, in such cases, from the justice, to the Court of Common Pleas.⁴

But a *certiorari* does not lie to remove the proceedings of a court martial; if their proceedings be erroneous, they are merely void.⁵ Nor has this writ ever been resorted to, in proceedings before the probate court; probably because the remedy by appeal is sufficient, or where not sufficient, the proceedings are considered void.

In some cases, where the proceedings have been improperly brought before the court by writ of error, instead of *certiorari*, the court have considered the questions as⁶ coming up on *certiorari*, so as to affirm or quash them. But this indulgence has never been granted, unless a question of general consequence arose, when it was important to have the law settled and known, for the

¹ *Lowell v. Spring*, 6 Mass. Rep. 398. *Commonwealth v. Ellis*, 11 Mass. Rep. 462. *Vandusen v. Comstock*, 3 Mass. Rep. 184.

² *Gile v. Moore*, 2 Pick. Rep. 386. *Drowne v. Stimpson*, 2 Mass. Rep. 441.

³ *Pratt v. Hall*, 4 Mass. Rep. 239.

⁴ *Clark v. Commonwealth*, 4 Pick. Rep. 125.

⁵ *Ex parte Dunbar*, 14 Mass. Rep. 393.

⁶ *Drowne v. Stimpson*, 2 Mass. Rep. 441. *Pratt v. Hall*, 4 Mass. Rep. 239. *Winslow v. Anderson*, 4 Mass. Rep. 376. *Edgar v. Dodge*, 4 Mass. Rep. 670. *Ball v. Brigham*, 5 Mass. Rep. 406.

information of the people, and for the regulation of proceedings in inferior jurisdictions.¹

Mode of procuring a writ of certiorari. The *certiorari* is not, as in cases of error, a writ of right, demandable at the pleasure of the party; it is granted or refused by the court at their discretion, upon application and a hearing of both parties. The course of proceeding to obtain a *certiorari*, is to make a petition to the court, stating the substance of the proceedings complained of, and the errors alleged. This may be presented and heard in any county.² An order of notice will be made upon motion of the petitioners, returnable as the court shall order, to the opposite party, to shew cause why a writ of *certiorari* should not issue. It is the duty of the petitioners, to take care that the order of notice embraces the proper persons, and all persons entitled to notice; and where a writ issues without such notice to the opposite party, the court will quash it, as having issued improvidently.³

The petition may be heard and granted, at a term holden by one judge; and as it is a matter within his discretion, it seems doubtful whether exceptions can be taken to his decision.

Before granting the application, the court will always look into the record, and even into the circumstances attending the process, and if the error be merely in the forms of the proceedings, not affecting the substantial justice of the case, the court will refuse

¹ *Edgar v. Dodge*, 4 Mass. Rep. 670.

² *Taylor v. Henry*, 2 Pick. Rep. 397.

³ *Commonwealth v. Downing et al.* 6 Mass. Rep. 72.

the writ.¹ The reason assigned is, that after the writ is granted, and the record brought up, if any error appear, the court are bound to quash the whole proceedings, and that this might in many cases, prejudice one party to the benefit of another, who had suffered no material injury.

The same reason applies with equal force to writs of error, and there seems to be no more difficulty in the exercise of the same discretion where the record is before the court, than where application is made for the writ. The rule conflicts with the general principle, that all inferior jurisdictions are to be strictly confined to prescribed forms, and it operates as a virtual abolition of all the forms, however positively enjoined by law, which the court may think not connected with the essential justice of the case. The rule, however, has been uniformly acted upon, and in one case,² the court examined papers not recorded, and considered facts alleged and not denied, in forming their conclusion to reject the petition.

If the writ be granted and issued, an order of notice of the writ and its return day is made, which must be served upon the parties interested. Where upon a writ of *certiorari* to remove the record of the court of sessions, relative to the altering of a county road, one of the locating committee was served with notice, and he alone made a party to the suit, the court objected that there seemed to be no proper parties, and said that notice ought to be given to the county, if they were interested, and another to the town in which the

¹ *Ex parte Weston et al.* 11 Mass. Rep. 417.

² *Inhabitants of New Salem et al. Petitioners*, 6 Pick. Rep. 470.

road lay; for that the committee of the sessions had no interest in the cause.¹

The hearing upon the writ of *certiorari*, must be by the full court, and a new assignment of errors is not necessary.²

If a *certiorari* issue, requiring only a part of the record of the cause to be certified, the court will quash the writ, as having issued improvidently.³ If an incomplete return be made by the inferior court, the petitioner may suggest a diminution of the record, and a new *certiorari* will issue.⁴ Where the several parts of the proceedings in the case are so connected together, as to make the validity and force of one part, to depend on the other, the whole must be quashed or affirmed. But the court may quash the proceedings in part, and affirm the residue, where the part quashed is independent, and unconnected with the part affirmed.⁵

Judgment on a writ of certiorari. The proceedings below must be either *quashed* or *affirmed*, as they stand; no new judgment can be entered by the court, as in case of a writ of error; if there be error, they merely vacate the former decree,⁶ and no costs are allowed.⁷

¹ *Commonwealth v. Peters*, 3 Mass. Rep. 229.

² *Commonwealth v. Sheldon*, 3 Mass. Rep. 188.

³ *Thatcher et al. v. Miller*, 11 Mass. Rep. 413.

⁴ *Commonwealth v. New Milford*, 4 Mass. Rep. 446.

⁵ *Commonwealth v. Blue Hill Turnpike Corp.* 5 Mass. Rep. 420.

⁶ *Commonwealth v. Ellis*, 11 Mass. Rep. 462.

⁷ *Thatcher et al. v. Miller*, 11 Mass. Rep. 413.

CHAPTER XV.

REPORT OF THE JUDGE.

Another, and usual mode, in the Supreme Court, of reserving questions of law, for argument and decision, is upon a *report of the case, by the judge*.

If any questions arise in the course of the trial, in relation to which any doubts are entertained, by the judge who presides in the case, or with the judge's opinion upon which, either party is dissatisfied, the questions may be saved, and the trial proceed and a verdict be taken, subject to the opinion of the full court, upon a report by the judge.

A statement or report of the case is then drawn up by the judge, stating the points saved, and the manner in which he ruled them at the trial; and the case is continued to the next law term. The case is then, in its order, heard upon the report, and judgment rendered on the verdict, or the verdict amended, or set aside, and judgment entered for the other party, or a new trial ordered, according to the nature of the case.

This report, however, is frequently directed by the judge, to be made up by the counsel, who save the questions; and when so made up, it is submitted to the judge, who, if it be correct, signs the same, as if prepared by himself.

CHAPTER XVI.

AGREED STATEMENT OF FACTS.

Another mode of presenting questions, for determination by the full court, is by an *agreed statement of facts*.

If there be no dispute between the parties as to the facts in the case, — and the only question be, as to the legal rights, arising from them, the parties, instead of submitting the case to the jury, may enter into an agreement of the facts.

The facts, as they are agreed, must be stated in writing, and signed by the respective parties, or their counsel. The fact of such an agreement is then minuted upon the docket, and at the next law term, the case is heard and determined by the court, upon the agreed statement.

CHAPTER XVII.

NEW TRIAL.

Formerly, the principal remedy for the reversal of a verdict unduly given, was by writ of *attaint*.¹ But *attaints* upon untrue verdicts are not known in our practice, and are virtually or distinctly abolished elsewhere;² and it has for a long time been the practice, in case of a defect of judgment, arising from matter *dehors* the record, to apply to the court for a new trial, which is a rehearing of the cause before another jury.³

If every verdict were final in the first instance, it would in some degree destroy the present valuable method of trial by jury, and would, where it became possible, drive away all causes of consequence from courts of common law, to those where a different mode of trial is adopted. Causes of great importance are often brought before juries upon the general issue, where the facts are complicated, and the evidence is intricate, of great length, and sometimes contradictory, and when questions of great nicety and difficulty are involved in the discussion. Either party may be surprised by a piece of evidence, which at another time, he could have explained or answered, or he may be perplexed by a legal doubt, which a little recollection would have solved. In the hurry of a trial,

¹ 3 Black. Comm. 388.

² 2 Paine & Duer. Pract. 122. Stat. West 2.

³ 2 Arch. Pract. 252.

from a want of previous knowledge of the facts, the ablest judge may mistake the law, or misdirect the jury; he may not be able to state the facts and lay them before the jury, so as to enable them clearly to understand the case. The jury are to agree upon their verdict without dispersing, and under these circumstances, the most intelligent men, with the best intentions, may bring in a verdict, which they themselves might afterwards wish to reverse.

So desirous were our ancestors to prevent surprise, and to do justice in every case, that until a few years past, any party, against whom no more than one verdict had been given, might review his cause, and submit it again, as a matter of right, to the decision of another jury.¹

This right is now, in most cases, taken away, but the power of granting new trials, belongs to each of the courts respectively, which, when properly exercised, goes far towards rendering perfect, this excellent mode of trial.

Although the courts feel disposed to exercise their power very liberally, yet it must be made to appear to them, that it is necessary for the sake of justice, that the cause should be further heard and considered.

A new trial will not, in general, be granted, where the amount in dispute is too inconsiderable to merit a second examination. In the application of this rule, however, reference is to be had to the habits of our people, and to the difference of expense of litigation, here and in England. Nor will a new trial be granted, upon mere nice and formal objections, which do not

¹ Stat. 1786. ch. 66. repealed. Stat. 1788. ch. 11.

go to the merits, nor in cases of strict right, nor where the evidence is at all doubtful, nor for defect in form, if it do not appear that injustice has been done.¹ In criminal cases, no new trial is ever granted, where the verdict is one of acquittal, but if the verdict be against the accused, a new trial may be had, if justice require it.

It is difficult to fix, in all cases, absolute rules upon this subject; the granting or refusing a new trial, must depend in a great measure upon the legal discretion of the court, guided by the nature and circumstances of the case, and directed with a view to the attainment of justice.²

The most ample powers are given by statute, to both of our courts, to grant new trials, in cases where justice and equity require it, provided the application to the Supreme Court be made within *three years* from the rendition of judgment, and in the Common Pleas within *one year*.³ Justices of the peace have no power with us to grant new trials.

A new trial cannot be granted in a civil action, at the instance of one of several defendants; nor for a part only of the cause of action.⁴

In general a new trial will not be granted against a defendant in a criminal case, though they are frequently granted in his favor.⁵ If, however, the verdict in his favor be obtained by fraud on his part, perhaps a new trial would be granted, even against a defendant who had been acquitted.⁶ But according to the Eng-

¹ *Booden v. Ellis*, 7 Mass. Rep. 507.

² *Bright v. Eynon*, 1 Burr. Rep. 390.

³ Stat. 1791. ch. 17. s. 2. Stat. 1820. ch. 79. s. 7.

⁴ 3 Salk. 362.

⁵ *King v. Mawbey et al.* 6 Term. Rep. 619. *King v. Gibbs*, 1 East. Rep. 173. 5 Burr. Rep. 2669.

⁶ 2 Stra. Rep. 1238. 2 Salk. 646. *Ld. Ray. Rep.* 63.

lish practice, a new trial cannot be granted in any criminal case, where the offence is above a misdemeanor; the remedy in such case, is by a recommendation of the prisoner to mercy.

In criminal cases, where several defendants are tried at the same time, and some are acquitted, and others not, the court may grant a new trial as to those who are convicted, if the conviction be improper.¹

It is a general rule, that a party shall not move for a new trial, after a motion in arrest of judgment.² But if the facts, which are made the ground of the motion, or petition for a new trial, are unknown when the motion in arrest is made, this rule will not apply.³

In the Court of Common Pleas, it is not usual to grant new trials, where an appeal can be taken to the Supreme Court; but where there has been a mistrial in the Common Pleas, this rule does not apply; as where the jury took out several depositions, which were not read in court, a new trial was granted, though an appeal lay.

A new trial will not be granted, on account of any order or determination of the judge, who tries the cause, in relation to any matter within his discretion.⁴

The principal grounds for setting aside a verdict, and granting a new trial are,

1. Misbehavior of the prevailing party.
2. Misconduct, or mistake of the jury, or for want of a proper jury.
3. Excessive, or too small damages.
4. Verdict against law, or evidence.

¹ *King v Mawbey et al.* 6 Term. Rep. 619.

² 2 Salk. 647. *King v. White et al.* 1 Burr. Rep. 334.

³ Bul. N. P. 325. Tidd. Pract. 821.

⁴ *Pierce v. Thompson*, 6 Pick. Rep. 193.

5. Misdirection, or omission of the judge in summing up ; admitting or refusing testimony contrary to law.

6. Unavoidable absence, or mistake of witnesses.

7. Discovery of new and material evidence.

SECT. I. MISBEHAVIOR OF THE PARTY PREVAILING.

If a party be guilty of any improper conduct towards the witnesses, as by threatening or persuading them, or by influencing them upon the stand, as by making signs how the witness shall answer, a new trial will be granted ;¹ so, if a party produce, and cause to be sworn a witness, whom he knows to be interested, without disclosing the circumstance.²

If any new evidence be furnished to the jury, after they leave the bar, by the party prevailing, a new trial will be granted.

By *Stat.* 1807. *ch.* 140. *s.* 17. it is provided, that if any person obtaining a verdict in his favor, in any court in this commonwealth, shall, during the session of the court, in which the verdict shall be obtained, give to any of the jurors in the cause, knowing them to be such, any victuals, drink, or entertainment, or other article by way of treat, or gratuity, whether before or after verdict, on due proof thereof, it shall be a sufficient reason, at the discretion of the court, to set aside the verdict, at the election of the adverse party, and to award a new trial of the cause.

¹ *Grovenor v. Fenwick*, 7 Mod. Rep. 156.

² *Niles v. Brackett*, 15 Mass. Rep. 378.

Where, before the verdict, the son-in-law of the plaintiff, who was also a witness, said to one of the jurors who tried the cause, that it was of great consequence to him, and that he should have to pay the costs, if it went against the plaintiff, and that the defence was a spiteful thing on the part of the defendant, the court granted a new trial, there having been a verdict for the plaintiff.¹

If a party obtaining a verdict, have taken any unfair advantage, contrary to justice and good conscience, to procure a verdict in his favor, a new trial will be granted. Thus in an action brought against a party for goods sold, and as indorser of a note, which had been given for the goods, but upon which time had been given to the maker, so as to discharge the indorser, the plaintiff proved the sale of the goods, and then refused to produce the note, which the defendant came prepared to meet ; no notice having been served upon the plaintiff to produce the note, the defendant was not allowed to give evidence of its contents ; under the circumstances, the court on motion granted a new trial.²

If papers, furnishing material evidence in favor of the party prevailing, which are not read on the trial, be delivered to the jury, when they retire to agree upon their verdict,³ a new trial will be granted. But if they have not looked at them, or been influenced by them, this is no ground for setting aside the verdict.⁴

¹ *Knight v. Freeport*, 13 Mass. Rep. 218.

² *Anderson v. George*, 1 Burr. Rep. 353. In our practice, in a similar case, the court would grant a continuance, so as to give the party time to serve notice, &c.

³ *Whitney v. Whitman*, 5 Mass. Rep. 405. A new trial would be granted in such case, whether the papers were delivered by mistake, or the "oblique conduct" of either party. See case last cited.

⁴ *Hackley v. Hastie et al.* 3 Johns. Rep. 252. and see cases cited in 1 Paine & Duer. Prac. 551.

Any practice by the attorney of the party, who has obtained a verdict, has the same effect as if done by the party himself; — as where an attorney wrote letters to some of the jurors, stating the hardship of his client's case, and a verdict was rendered in his favor, a new trial was granted.¹

Merely requesting a juror to appear at the court, is no cause for granting a new trial.²

Where it was sworn, that handbills, reflecting on the plaintiff's character, had been distributed in court, and shewn to the jury on the day of trial, the court granted a new trial, and would not receive from the jury affidavits, offered to prove that they had not seen them, and though the defendant denied all knowledge of the handbills.³

SECT. II. MISCONDUCT OR MISTAKE OF THE JURY, OR FOR WANT OF A PROPER JURY.

New trials are often granted on account of the misconduct or mistake of the jury; — as where a jury determined their verdict by casting lots;⁴ but where each juror named a sum, and the whole being added together was divided by twelve, and the jury took the quotient for their verdict, a new trial was refused.⁵

If it be made to appear, that a juror acted under the influence of improper motives, a new trial will be granted.⁶

¹ 2 Vent. 173.

² 1 Stra. Rep. 643.

³ *Coster v. Merest*, 3 Brod. & B. Rep. 272.

⁴ *Vaise v. Delaval*, 1 Term. Rep. 11. Barnes. Rep. 441. 1 Stra. Rep. 642.

⁵ *Grinnell v. Philips*, 1 Mass. Rep. 530, 543.

⁶ *Jeffries et al. v. Randall*, 14 Mass. Rep. 205.

On a motion for a new trial, the court will not inquire into the consequences of a verdict, as it affects costs, for these follow, and are regulated by the verdict, and not the verdict by them.¹ Where, therefore, the jury gave less than *twenty dollars*, in an action commenced in the Court of Common Pleas, but awarded in their verdict full costs, the court refused to grant a new trial, to enable the jury to give such a sum, as would entitle the plaintiff to full costs, the verdict, so far as it related to costs, being inoperative.²

The misconduct on the part of jurors, is not, in all cases, a sufficient ground for setting aside a verdict, and granting a new trial; and although their misconduct may subject them to punishment, yet if there do not appear to have been any abuse, the verdict will not be set aside.³ Thus, though after a jury have retired to deliberate on their verdict, it is irregular for them to separate, yet this circumstance alone is not sufficient to invalidate their verdict.⁴ But if there be a probability, or even the slightest suspicion of abuse, the verdict will be set aside.⁵ Where the jury procured their separation, by pretending to the constable, that they had agreed upon a sealed verdict, when in truth they had not, and conversations out of doors were afterwards carried on, in presence of some of them, relative to the suit, by persons not on the jury, and on assembling, they were sent out again, though objected to by the plaintiff, and they then returned with a verdict for the defendant, — it was set aside;⁶

¹ *Hagar v. Weston*, 7 Mass. Rep. 110.

² *Lincoln v. Hapgood et al.* 11 Mass. Rep. 358.

³ *Smith v. Thompson*, 1 Cowen. Rep. 221. note.

⁴ *Ibid.*

⁵ *Ex parte Hill*, 3 Cowen. Rep. 355. *Horton v. Hill*, 2 Cowen. Rep. 589. *Burrill v. Phillips*, 1 Gal. Rep. 360.

⁶ *Ibid.* *Oliver v. Trustees, &c.* 5 Cowen. Rep. 283.

and the court remarked, that here was not only suspicion of abuse, but that the circumstances of the case, in themselves, amounted to positive abuse.¹

But a verdict will not be set aside for irregularity or misconduct, where the jury have separated, after having agreed to a sealed verdict, and on coming into court, one of the jurors dissents from it, who subsequently, on the jury being sent out again, agrees to the verdict as originally rendered; there being no evidence or suspicion of abuse.²

Where a jury examined a witness, after retiring from the court, though he was examined before them in court, and his testimony was the same, a new trial was granted.³

It is not a sufficient cause for setting aside a verdict, and granting a new trial, that one of the jurors, as to whose personal qualifications no objection exists, had not been drawn and returned according to law, if the objection be not made until after verdict.⁴ So, if a person be returned as a juror *de talibus circumstantibus*, for the trial of one cause, and be afterwards empaneled on the trial of another, without being specially returned therefor, unless the objection be made before verdict, it will furnish no ground for a new trial.⁵

If a juror be objected to at the time of trial, and the fact on which the objection is founded, be inquired into, according to the course directed by the statute, and he be thereupon adjudged to stand indifferent in

¹ *Seymour v. Deyo*, 5 Cowen. Rep. 283. 1 Paine. & D. Pract. 550.

² Ibid. *Douglass v. Tousey*, 2 Wendell. Rep. 352.

³ 7 Bac. Abr. Verdict H. Cro. E. 411. Bul. N. P. 308. Com. Dig. Pleader S. 45.

⁴ *Amherst v. Hadley*, 1 Pick. Rep. 38. *Dovey v. Hobson*, 6 Taunt. Rep. 460.

⁵ *Howland v. Gifford*, 1 Pick. Rep. 43. note.

the cause, the same objection cannot be afterwards made to the verdict, as a cause for a new trial, especially if it appear, that justice has been done between the parties.¹

Nor will a new trial be granted, on the ground that a juror sat in the trial, as to whom there existed a good cause of challenge, but of which the party neglected to avail himself, when the jury was empaneled.² But if the party objecting, had examined the juror upon the *voir dire*, and failed to discover the fact, which would have disqualified him, a new trial might be granted, if it were afterwards discovered that he did not stand indifferent in the cause.³

The affidavits of jurors themselves, will never be received, to prove or rebut the presumption of any impropriety or misconduct on their part, relating to the trial or verdict.⁴

So, if a juror, through a mistake of his duty, agree to a verdict contrary to his own opinion, because he believes that the opinion of the majority must govern, his affidavit to prove the fact, will not be received.⁵

SECT. III. EXCESSIVE, OR TOO SMALL DAMAGES.

A new trial may be granted, for excessive or too small damages, where the law has fixed some settled

¹ *Borden v. Borden*, 5 Mass. Rep. 67.

² *Jeffries et al. v. Randall*, 14 Mass. Rep. 205.

³ *Ibid.* Stat. 1807 ch. 140. s. 9.

⁴ *Vaise v. Delaval*, 1 Term. Rep. 11. *Coster v. Merest*, 3 Brod. & B. Rep. 272. *Grinnell v. Phillips*, 1 Mass. Rep. 542. *Claggage v. Swan*, 4 Bin. Rep. 150. *Brooke v. White*, 4 Bos. & Pul. Rep. 330. Vide 1 Stra. Rep. 643. Say. 100. *Smith v. Cheetham*, 3 Caines' Rep. 57. 2 Dall. Rep. 55. Burr. Rep. 1696, 2686.

⁵ *Commonwealth v. Drew et al.* 4 Mass. Rep. 391.

rate, by which the jury are to be governed in assessing them; and for excessive damages likewise, where they are so exorbitant, that though they depend upon opinion merely, the court may reasonably presume that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, prejudice, partiality, or corruption, — causes which naturally produce error and injustice.

The damages, however, must be clearly excessive, and such as every body would cry out against, and not merely a sum larger than the judge, who presided at the trial, would have given.¹

In the case of *Hewlett v. Cruchley*,² Mansfield C. J. says, “as to that, it is extremely difficult to estimate damages; you may take twenty juries, and every one of them will differ, from *two thousand* down to *two hundred pounds*. I always have felt, that it is extremely difficult to interfere, and say when damages are too large. Nevertheless, it is now well acknowledged, in all the courts of *Westminster Hall*, that, whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the courts will send the inquiry to another jury. There are some damages so large, that it is impossible but that every man must acknowledge that they are too large. But in every case, where courts interfere, they always go into all

¹ Vide Stra. Rep. 692. Burr. Rep. 609, 1846. 2 Wils. Rep. 160, 205, 244, 248, 252, 405. 3 Wils. Rep. 18, 62. *Gilbert v. Burtenshaw*, Cowp. Rep. 230. *Ducker v. Wood*, 1 Term. Rep. 277. *Duberley v. Gunning*, 4 Term. Rep. 651. *Jones v. Sparrow*, 5 Term. Rep. 257. *Pleydell v. Dorchester*, 7 Term. Rep. 529. *Dunham et al. v. Baxter*, 4 Mass. Rep. 79. *Clark v. Binney*, 2 Pick. Rep. 113. *Bodwell v. Osgood*, 3 Pick. Rep. 379. *Shute v. Barrett*, 7 Pick. Rep. 82.

² 5 Taunt. Rep. 277.

the circumstances of the plaintiff and defendant, and put themselves in their situation, and enter into all their conduct."

New trials are but seldom granted in such cases, on account of the smallness of the damages, although it is sometimes done, when the case can be brought within the spirit of either of the rules before laid down.¹

SECT. IV. VERDICTS AGAINST LAW OR EVIDENCE.

A new trial will be granted, where the verdict is *against the law*,² — *against the evidence*,³ or *manifestly against the weight of evidence*.

But a new trial will not be granted, where there is much conflicting testimony on both sides, which cannot be reconciled, unless it appear that the testimony was not duly weighed by the jury, in giving their verdict. A difference of opinion between the court and jury, as to the conclusions to be drawn from the evidence, or as to the credit due to the witnesses, is not a sufficient ground for granting a new trial. And in all cases where the evidence is doubtful, or *in equilibrio*, regard should be paid by the court, to the finding of the jury, for it is their province, to find a verdict upon the testimony.⁴ The decision ought perhaps to be so manifestly wrong, as to satisfy the court, that the jury could not have understood the case rightly, — or considered it

¹ 2 Salk. 647. Stra. Rep. 940, 1051.

² *Dillingham v. Snow et al.* 5 Mass. Rep. 547.

³ *Hammond v. Wadhams*, 5 Mass. Rep. 353. *Wait v. McNeil*, 7 Mass. Rep. 261. *Hoyt v. Gilman*, 8 Mass. Rep. 336. *Curtis et al. v. Jackson*, 13 Mass. Rep. 507.

⁴ *Bright v. Eynon*, 1 Burr. Rep. 390.

properly, — or that they were under the influence of improper motives, before they should set aside the verdict, as being against the evidence.¹

A new trial will not be granted, on the ground that the verdict is against evidence, although it be given against the positive testimony of a witness unimpeached, if there be circumstances discrediting such testimony, growing out of the facts in the case, or in the connexion of the witness with the cause or the parties;² — nor where there is an entire absence of direct proof, and presumptions alone are relied on to establish the necessary facts;³ — nor in a penal action, unless some rule of law has been violated; — nor in a hard or trifling case, after a verdict for the defendant.⁴

A new trial will not be granted, after a verdict for the plaintiff, where the defence is unconscionable, and the verdict is according to the justice and honesty of the case, though it may be against the weight of evidence.⁵

If a second jury return a verdict similar to the first, a third trial will not often be granted, because the verdict is against the evidence.⁶

¹ *Danielson v. Andrews*, Worcester June T. C. C. P. 1822. and vide *Swain v. Hall*, 3 Wils. Rep. 45. *Ward v. Center*, 3 Johns. Rep. 271. *Bright v. Eynon*, 1 Burr. Rep. 390. *Bates v. Graves*, 2 Ves. jr. 288.

² *Wait v. McNeil*, 7 Mass. Rep. 261. *Hall et al. v. Huse*, 10 Mass. Rep. 39.

³ *Blanchard v. Colburn et ux.* 16 Mass. Rep. 345.

⁴ *Jervois q. t. v. Hall*, 1 Wils. Rep. 17. *Fonereau v. ———*, 3 Wils. Rep. 59. *Wilson v. Rastall*, 4 Term. Rep. 753. *Jarvis v. Hatheway*, 3 Johns. Rep. 180. *Hurtin v. Hopkins*, 9 Johns. Rep. 36. *Boyden v. Moore*, 5 Mass. Rep. 365.

⁵ *Wilkinson v. Payne*, 4 Term. Rep. 468. *Edmonson v. Machell*, 2 Term. Rep. 4.

⁶ For the rule and its exceptions, vide *Goodwin v. Gibbons*, 4 Burr. Rep. 2108. 1 Lev. 97. Salk. 649. 6 Mod. Rep. 22. *Silva v. Low*, 1 Johns. Cas. 336.

If the judge who presided at the trial of the cause, be satisfied with the verdict, it is not usual to grant a new trial, upon the ground of the verdict being against evidence.¹

SECT. V. MISDIRECTION OR OMISSION OF THE JUDGE, IN SUMMING UP, ADMITTING OR REFUSING TESTIMONY CONTRARY TO LAW.

A new trial will be granted, for the misdirection, or omission of the judge in summing up;² or on account of his admitting or refusing testimony, contrary to law.³ As where the defendant had brought into court, what she supposed justly due, but it did not prove enough by *forty-one cents*, and the judge directed the jury, that they might still find for the defendant, if they considered the deficiency a mere trifle, and they found accordingly.⁴

Where the judge instructed the jury, that the evidence offered by the plaintiff, from which they might have presumed facts, sufficient to justify a verdict for the plaintiffs, was wholly insufficient, a new trial was granted.⁵

Where evidence was rejected, which ought to have been received on one count, though that count was not relied on, nor even read by the plaintiff, a new trial

¹ Bul. N. P. 327.

² *Bailes v. Davis et al.* 1 Pick. Rep. 206. *Fonsec v. Magnay et al.* 6 Taunt. Rep. 231. *Albot v. Sebor*, 3 Johns. Cas. 39.

³ *Hunt v. Adams*, 7 Mass. Rep. 518. *Mercer v. Sayre*, 7 Johns. Rep. 306.

⁴ *Boyden v. Moore*, 5 Mass. Rep. 365.

⁵ *Aylwin v. Ulmer*, 12 Mass. Rep. 22. *Wilkinson v. Scott*, 17 Mass. Rep. 249. *Wilson v. Rastall*, 4 Term. Rep. 753.

was granted, there having been a general verdict for the defendant on all the counts.¹

If the judge omit to charge the jury, upon the ground that the evidence is clear in favor of one party, and the jury find for the other, a new trial will be granted.² So if the judge, after the cause is committed to the jury, give them any directions concerning it, except in open court, a new trial will be granted.³

But it is a matter of discretion with the court, to grant a new trial or not, under all the circumstances of the case ; and they will not, therefore, set aside a verdict, for the misdirection of the judge, where it appears that it was not material, and that it has not occasioned injustice ;⁴ nor for the admission of illegal testimony, where it appears on the motion, that the same fact would be proved, at a subsequent trial, by legal evidence, provided such evidence be incontrovertible in its nature, as a record or the like ;⁵ and a new trial will not be granted, although a judge err in refusing a nonsuit, if in a subsequent stage of the cause, the facts necessary to the maintenance of the action, be shewn.⁶

Where the cause of action was trifling, and the plaintiff recovered only nominal damages, the court

¹ *Mid. Canal Co. v. Mc Gregore*, 3 Mass. Rep. 124.

² *Page v. Pattee*, 6 Mass. Rep. 459.

³ *Sargent v. Roberts et al.* 1 Pick. Rep. 337. *Emerton v. Andrews*, 4 Mass. Rep. 653. *Jones et al. v. Fales*, 5 Mass. Rep. 101. *Newhall v. Hopkins*, 6 Mass. Rep. 350.

⁴ *Dole v. Lyon*, 10 Johns. Rep. 447. *Fleming v. Gilbert*, 3 Johns. Rep. 528.

⁵ *Goodrich v. Walker*, 1 Johns. Cas. 250. *Watson et al. v. Delafield*, 2 Caines' Rep. 224.

⁶ 2 Wendell. Rep. 561. *Hoyt v. Gilman*, 8 Mass. Rep. 336. 17 Mass. Rep. 1.

refused to set aside a verdict for the misdirection of the judge, provided the plaintiff would elect to discontinue without costs ;¹ and the court have refused to set aside a verdict, on motion of the defendant, where the recovery was only nominal, or for a very small sum, and the defendant was entitled to costs as the verdict stood.² So likewise, a verdict for defendant, or a nonsuit, will not be set aside, where it is evident that the plaintiff can only recover nominal damages.³ And the court will not hear a motion to set aside a nonsuit at the trial, where the plaintiff has since died, the only effect obviously being merely to unsettle the question of costs.⁴

Where, after the plaintiff had rested his cause on the trial of a question of fact, the defendant's counsel called a witness on his part, but upon the judge's intimating an opinion in favor of the defendant, forebore to examine the witness, or to introduce any further testimony, although urged to do so by the defendant, and the jury found for the plaintiff, it was holden that the suggestion of the judge, he not having excluded, or refused to hear any testimony, was no ground for a new trial.⁵ And so where counsel rose to address the jury, and the judge told him that he should charge against him, and he did not therefore address the jury, it was holden that this was a voluntary relinquishment of the right to address them, and not compulsory

¹ *Fleming v. Gilbert*, 3 Johns. Rep. 528.

² *Hurst v. Barrell*, 5 Johns. Rep. 137. *Van Slyck v. Hogeboom*, 6 Johns. Rep. 270.

³ *Hyatt v. Wood*, 3 Johns. Rep. 239. *Brantingham v. Fay*, 1 Johns. Cas. 255. But vide *Howe et al. v. Austin*, 12 Pick. Rep. 270.

⁴ *Seymour v. Deyo*, 5 Cowen. Rep. 289.

⁵ *Beckman v. Bemus*, 7 Cowen. Rep. 29.

by the decision of the judge, and the court refused for this reason to grant a new trial.¹

It seems that where the judge omits to notice material testimony, in his charge to the jury, the court will not grant a new trial, unless the party call his attention to such testimony.²

If the judge, however, omit to instruct the jury, as to a material point or fact in the cause, and their verdict be in favor of the party, who was bound to prove the fact, and without proof of which the verdict would be wrong, a new trial will be granted, although there was evidence to prove the fact.³

A new trial will not be granted, on the ground that improper evidence was admitted, and commented on by the judge, if no objection to its admission were made at the trial, but the objection will be considered as waived.⁴

If an action be founded on a written instrument, in which no consideration is expressed, and no objection be made at the trial, of the want of consideration, the objection cannot be made after verdict, as the ground of a new trial.⁵

If a fact capable of proof, be omitted to be proved at the trial, and no objection be then made of the want of such proof, it cannot be made after verdict, as the ground of a new trial.⁶

The court will not hear a motion for a new trial, on the ground of the misdirection of the judge, unless

¹ *Jackson d. Woodruff et al. v. Cody*, 9 Cowen. Rep. 140.

² *Ex parte Baily*, 2 Cowen. Rep. 479.

³ *Truesdell v. Wallis*, 4 Pick. Rep. 63.

⁴ *Wait v. Maxwell*, 5 Pick. Rep. 217. but vide *Rich et al. v. Penfield*, 1 Wendell. Rep. 380. *contra*.

⁵ *Arms v. Ashley*, 4 Pick. Rep. 71.

⁶ *Maynard v. Hunt*, 5 Pick. Rep. 240.

the directions given appear, by exceptions allowed by the judge, or by his report; except in cases where the judge unreasonably refuses to allow the exceptions, or to make the report.¹

SECT. VI. UNAVOIDABLE ABSENCE OR MISTAKE OF WITNESSES.

The court will sometimes grant a new trial, on account of the unavoidable absence of witnesses.² But this must be where the party was so situated, that a continuance could not be had; for if a party, knowing his witnesses to be absent, choose to risk a trial without their testimony, he ought to abide by the result;³ and a new trial is never granted for the neglect of party, in not coming prepared with evidence, which he knew to exist, and might have produced at the former trial, or for not going into the examination of that evidence.⁴ But if the attendance of a material witness on one side, be prevented by the fraud or misconduct of the other party, a new trial will be granted.⁵

If the judge stop the party from producing all his evidence, upon the ground that sufficient has been given in, and the verdict be against such party, a new trial will be granted.⁶

Where the plaintiff had examined a witness, and delivered him over to the defendant for cross-examina-

¹ *Bond v. Cutler*, 7 Mass. Rep. 205. Reg. Gen. S. J. C. 48. Appendix A.

² 2 Salk. 645. 6 Mod. Rep. 22.

³ *Mercer v. Sayre*, 7 Johns. Rep. 306.

⁴ 2 Salk. 647, 653. Stra. Rep. 691. 1 Wils. Rep. 98. Black. Rep. 802. *Gist v. Mason et al.* 1 Term. Rep. 84. *Vernon et al. v. Hankey et al.* 2 Term. Rep. 113.

⁵ 11 Mod. Rep. 52, 141.

⁶ *Dunham et al v. Baxter*, 4 Mass. Rep. 79.

tion, and before any opportunity offered to enable the plaintiff to ask him any questions in explanation, the witness fell down in a fit, and the plaintiff proceeded to examine other witnesses, and try the cause; the court refused to grant a new trial, to give the plaintiff an opportunity of letting in the further testimony of the same witness.¹

A want of recollection of a fact by a party, which by due attention might have been remembered, is not a ground for granting a new trial.² So it is said, that if a witness have, from want of attention, or from not being prepared, made a mistake in giving his evidence, a new trial will not be granted, because this would be extremely dangerous in its consequences.³ But in other cases this rule is denied, and it is laid down, that if a party be nonsuited, by the mistake of a witness in a material part of his testimony, a new trial ought to be granted.⁴

The latter rule seems the more reasonable, though the reason assigned for the former, shows that it ought to be cautiously and judiciously applied.

If the testimony of witnesses, which occasioned a verdict, be founded upon, or derive credit from particular circumstances, and those circumstances be afterwards clearly shown to be false, a new trial will be granted.⁵

¹ *Depeyster et al. v. Col. Ins. Co.* 2 Caines' Rep. 85.

² *Bond v. Cutler*, 7 Mass. Rep. 205.

³ Say 27. *Steinbach v. Col. Ins. Co.* 2 Caines' Rep. 129.

⁴ 2 Anst. Rep. 517. Say 28. *Hewlett v. Cruchley*, 5 Taunt. Rep. 277. *Richardson v. Fisher*, 1 Bing. Rep. 145.

⁵ *Lister v. Mundell*, 1 Bos. & Pull. Rep. 427.

SECT. VII. DISCOVERY OF NEW AND MATERIAL EVIDENCE.

The most common cause for granting a new trial in our courts, is the discovery of new and material evidence, since the trial.

It is laid down in some of the elementary works upon the subject, that the discovery of a new and material evidence, is never a cause for granting a new trial, in England. This is not correct, though the instances there, are much fewer than they are here. In one case,¹ a new trial was granted, after a very strict scrutiny, on the ground that the whole of the plaintiff's case was a fiction, supported by perjury, which the defendant could not be prepared to meet, and that since the trial, proofs had been discovered of the iniquity and subornation of the witnesses.

In order to support a motion for a new trial, upon the ground of newly discovered evidence, it ought to be made to appear, that the testimony has been discovered since the trial, or that no laches is imputable to the party, and that the testimony is material ; if the party had known of the existence of the testimony, and could not procure it in time, he ought to have applied to postpone the former trial.²

A new trial will not in general be granted, for the purpose of introducing newly discovered evidence, merely cumulative in its character ;³ nor for the pur-

¹ *Fabrilus v. Cock*, 3 Burr. Rep. 1771.

² *Stockbridge v. West Stockbridge*, 13 Mass. Rep. 302. *Vandervoort et al. v. Smith*, 2 Caines' Rep. 155. *Hollingsworth v. Napier*, 3 Caines' Rep. 182.

³ *Smith v. Brush*, 8 Johns. Rep. 84. *Steinbach v. Col. Ins. Co.* 2 Caines' Rep. 129.

pose of impeaching the testimony given at a former trial, by discrediting the witnesses, or by proving them to have been convicted of crimes, which ought to have excluded them from testifying.¹

In slander, for charging the plaintiff with a felony, the court refused to grant a new trial, to let in newly discovered evidence in support of the plea of justification.²

A party will not be aided after verdict, or after a report in chancery, or in the case of an award of referees, by a new trial, unless he can impeach the justice of the verdict, report, or award, by facts, of which he could not avail himself in the former trial; or, where he was prevented from doing it, by the fraud, accident, or other act of the opposite party, without any neglect or improper conduct of his own.³

If the new evidence go to impeach the whole of the opposite party's case, by the imputation of fraud, a new trial will be sometimes granted; as where payment was sworn to at the trial, by two witnesses, who, there was strong reason to believe, had been tampered with.⁴

The court will decide upon the materiality of the newly discovered evidence, and grant or refuse the motion or petition for the new trial accordingly.⁵

¹ *Hammond v. Wadhams*, 5 Mass. Rep. 353. *Commonwealth v. Green*, 17 Mass. Rep. 515. *Commonwealth v. Drew et al.* 4 Mass. Rep. 391. *Halsey v. Watson*, 1 Caines' Rep. 24. *Shumway v. Fowler*, 4 Johns. Rep. 425. *Duryee v. Denniston*, 5 Johns. Rep. 248. *Rowley v. Kinney*, 14 Johns. Rep. 186.

² *Beers v. Root*, 9 Johns. Rep. 264.

³ *Standen v. Edwards*, 1 Vez. jr. 133. *Marine Ins. Co. v. Hodgson*, 7 Cranch. Rep. 332. *Duncan v. Lyon*, 3 Johns. Ch. Rep. 356. *Bigelow et al. v. Newell*, 10 Pick. Rep. 348.

⁴ *Shearman v. Wells*, S. J. C. 1821. Mss. *Peterson v. Barry*, 4 Bin. Rep. 481.

⁵ *Sawyer v. Merrill et al.* 6 Pick. Rep. 478.

Where a material witness, on being inquired of upon the *voir dire*, testified that he had no interest in the suit, and a verdict was found in favor of the party producing him, a new trial was granted upon newly discovered evidence of his interest, and which also contradicted his testimony.¹

SECT. VIII. MODE OF OBTAINING OR PETITIONING FOR NEW TRIAL.

Effect of new trial. If granted after verdict, and before judgment, a new trial vacates the verdict; when granted after verdict and judgment, it vacates both, when allowed on motion.

Of the forms of petitions and motions for new trials, and the manner of proceeding thereon. A petition for a new trial may be presented and heard in any county.² It is in the form of a motion, setting forth the causes upon which it is grounded. It may be dismissed, abated, or pleaded to; it is an application to the discretion of, and is heard before, the whole court; and the refusal or allowance of it cannot, therefore, be the foundation of a writ of error.

The question whether a new trial shall or shall not be granted, may come before the court in several forms; when after verdict and before judgment, it is presented usually by motion, or it may be upon the report of the judge merely.

Many questions of great difficulty may arise in the trial, as to the admission of evidence, where no dis-

¹ *Chatfield v. Lathrop*, 6 Pick. Rep. 417.

² *Taylor v. Henry*, 2 Pick. Rep. 397, 400.

pute exists, as to its truth or bearing, if it be admissible; in such cases, where the jury are not called upon to weigh its credibility, or to make up their verdict from its contradictions, it is common for the parties to have a verdict rendered by consent, subject to the opinion of the court upon the whole testimony, whether it be admissible or not, or whether the verdict can be sustained, or whether it shall be set aside, and a new trial granted; in this case the court have full power to alter the verdict, or to grant a new trial, each party having the benefit of all exceptions taken at the trial. The judge draws up the report, or what is oftener the case, one of the parties is directed to prepare the report, which is submitted to the other party, and if it be agreed to as correct, the judge signs it; if disagreed to, he corrects it, from his notes taken at the trial; no form of motion would be used in such case. Where there is a trial, and the cause is submitted to the jury, each party is entitled to make his exceptions in the course of the trial, as to the ruling of the judge, to the admission of evidence, and, in short, to every part of the proceedings of the trial, which are contrary to the rules of law, and the practice of the court; the judge who tries the cause, notes the exceptions, and if the verdict be against the party making them, he may then offer his motion for a new trial, setting forth therein, the causes of his exceptions.

Time of making motion. By a rule of the court, it is ordered, that “hereafter, no motion shall be sustained for a new trial, in any civil action, after the verdict of the jury, either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence, or the weight of evidence,

unless, within *three days* after the verdict is returned, the counsel of the party complaining of the proceedings or the verdict, shall file a motion for new trial, specifying the grounds of his complaint, and causing a copy of the said motion to be delivered to the adverse counsel, on the day the same shall be filed. And if it shall be alleged, as the ground, or one of the grounds of the motion, that the verdict is against the evidence, or the weight of it, the counsel of the party shall, within *ten days* after filing this motion, make out and deliver to the clerk, a copy of his minutes of the evidence, if oral, and shall specify the depositions or documents, on which he intends to rely in support of his motion;—otherwise the motion shall be stricken off, and judgment may be rendered on the verdict, on the motion of the counsel for the party, in whose favor the verdict shall be returned.

Provided, however, that this rule shall not apply to cases in which the judge presiding at the trial shall, of his own mere motion, reserve any question of law;—nor shall it affect the right of parties to file exceptions, pursuant to the statute in that case made and provided.¹

And provided, also, that should the trial of any case be had, so near the close of any term, that the foregoing rule cannot be complied with, the motion for new trial shall be made before the court adjourns, and the specifications of the reasons shall be filed within *three days* afterwards, and that such time shall be allowed, for compliance with the residue of this rule, as the presiding judge shall order.²

¹ Stat. 1804. ch. 105. s. 5. Vide ante Book II. Chap. XII. Exceptions.

² Reg. Gen. S. J. C. 48. Appendix A.

If the cause for the new trial arise after the verdict, and before judgment is rendered, as for instance, if it be the discovery of new and material evidence, the motion should be made in writing, stating the cause. And the motion must, before being heard, be accompanied with necessary affidavits, proving the facts set forth in the motion, so that the opposite party may have an opportunity to meet them by counter evidence.

The affidavit of the party moving for the new trial, will be received, to prove those facts alone, which could be known only to himself.¹

If a verdict and judgment have been entered in the case, the course to obtain a new trial, is by petition, setting forth the causes thereof.²

By a rule of the Supreme Court,³ all copies of papers are to be furnished by the party moving for a new trial. The papers are to be filed in the clerk's office, and he, without delay, furnishes copies for the court, at the expense of the party filing the same. The copies may be made by the party, in which case, if he prevail, he shall be allowed for the same in his costs. They must be written out in a fair legible hand, on one side of the sheet, and the number of the action and the names of the parties written upon the papers, which must be folded and filed uniformly.⁴

The court may impose terms upon the party moving for a new trial, as to any matter relating to the trial, as well as it respects costs.⁵

¹ *Coffin v. Abbot*, 7 Mass. Rep. 252.

² This case is provided for by the statutes of review. Vide Review. *supra* Chap. XVIII.

³ Reg. Gen. S. J. C. 26. Appendix A.

⁴ Vide ante page 200, 201.

⁵ *Pleydell v. Dorchester*, 7 Term. Rep. 529.

Where a judgment has been rendered on the verdict, and in other cases which are provided for by the statute,¹ in which reviews are granted, the mode of proceeding is regulated by the statute, and will be found treated of under the head of review.²

¹ Stat. 1788. ch. 11. Stat. 1791. ch. 17.

² Chap. XVIII. *supra*.

CHAPTER XVIII.

REVIEW.

Connected with the subject of new trials, is that of *review*, which is a statutory method of retrying a case.

Formerly, any party, against whom no more than one verdict had been returned, might review his case, as a matter of right.¹ While the organization of the court was such, that questions of law and fact were finally disposed of at the same time, this might be no very inconvenient mode of correcting any mistake, which might be made by the court, and it might happen, that it would conduce to the furtherance of justice, by affording a more complete opportunity for the developement of the facts. It was a provision early adopted in our colonial practice, and was again re-enacted, after the adoption of our constitution.

It was intended probably in the first instance, to be applied to those cases only, where different verdicts had been returned in the two courts. In practice, however, it was extended, as well to cases brought up from the Common Pleas without trial, as to those, where a verdict had been rendered. The law, however, giving reviews as a matter of right, has been repealed.²

SECT. I. WHEN REVIEWS WILL BE GRANTED.

By *Stat. 1788. ch. 11.* the Supreme Court are authorized to grant a review upon petition, after judg-

¹ Stat. 1786. ch. 66.

² Stat. 1817. ch. 85.

ment on a verdict, whenever there may be legal cause for setting aside such verdict before judgment, on such terms as the court may think proper. And whenever, by reason of any mistake, or accident, judgment may be rendered upon *discontinuance*, *nonsuit*, *nil dicit*, *non sum informatus*, *report of referees*, or *default*, to the hindrance and subversion of justice, the court are empowered to grant a review. Under the provisions of this act, the court are empowered to stay execution, if they see cause, and to award costs against the petitioner, if he fail to support his petition.

And by the *third section* of this statute, it is provided, that wherever, by reason of any of the causes above-mentioned any judgment in the Court of Common Pleas, or before any justice of the peace, hath been, or hereafter may be rendered in manner, as set forth in the foregoing sections of the statute, or any appeal hath been, or hereafter may be prevented or lost, to the hindrance or subversion of justice; the party aggrieved shall produce in, and file with the clerk of the Supreme Judicial Court, a copy of the record of the cause, duly attested, and shall petition the justices of the same court, for a review of the cause, in manner as aforesaid, — the justices aforesaid may grant a review of said cause, in manner aforesaid, to be heard and determined in the said court.

By *Stat. 1791. ch. 17. s. 2.* the same court are authorized to grant reviews upon petition, in civil actions, whenever they shall judge it reasonable, if application be made within *three years*.

The *Stat. 1788.* limits the application for a writ of review, to within *one year and a half* from the rendition of judgment; the statute last cited does not

repeal the provisions of the former,¹ but as the court have the discretionary power, by *Stat.* 1791. over all subjects, included in the terms of *Stat.* 1788. it would seem to be the reasonable construction of both statutes, to say, that a writ of review will be granted, within *three years*, for any cause comprehended in either of them.

It has been settled, that no more than one review can be granted under *Stat.* 1791, though it does not contain any restriction on this subject, like that of 1788.²

But after a verdict on a review thus granted, the court may set it aside, for any reasonable and legal cause, and direct a new trial.³

The court have authority to grant reviews of actions, in which judgments have been rendered upon a case stated, where the parties have been misled into an agreement, without any laches on their part, or where any fact has been mis-stated, or omitted.⁴ So a review may be granted at the instance of a trustee, where a judgment upon *scire facias*, has been rendered against him.⁵

Where a petitioner for review has had no trial, but has been defaulted, the court will grant a review on slight evidence, although the evidence be contradicted by testimony, on the part of the respondent;⁶ but it is usual to require, at least, *prima facie* evidence that injustice has been done, before a review, in such case, will be granted.⁷

¹ *Ruggles et al. v. Freeland*, 6 Mass. Rep. 513.

² *Ibid.*

³ *Ibid.*

⁴ *Stockbridge v. Stockbridge*, 13 Mass. Rep. 302.

⁵ *Packard ex parte*, 10 Mass. Rep. 426.

⁶ *Coffin v. Abbot*, 7 Mass. Rep. 252.

⁷ *Judd v. Buchanan*, 4 Mass. Rep. 579.

Where the court perceive that the judgment complained of, might be reversed on error, they will not grant a review.¹

By *Stat.* 1788. *ch.* 47. it is provided, that in case of the death of the demandant, in any *real* action, the tenant may sue out his review, where one is allowed him, against the person claiming under the demandant; if the tenant die, the demandant may sue out his review, against the tenant in possession, or the person claiming under the defendant; if both parties die, their representatives may mutually prosecute their reviews against each other as above. In case of the death of either, or both the parties, in a *personal* action, the review may be prosecuted by, or against their legal representatives; and in case of the death of either party, pending the review, their representatives may come in, and prosecute and defend in the same manner, as the parties themselves might.

Though the language in the *section* of the statute last referred to, is very broad, and, in terms, applies to every species of action, yet it has been construed to extend to such actions only, as survive at common law,² with the exception of actions of *trespass quare clausum fregit*, and *trover*, which have been holden to survive, so as to enable the representatives to come in, and prosecute under this section of the statute.³

A petition for review abates by the death of the petitioner, pending the petition, and his representative cannot be admitted to prosecute, for the statute contains no provision to this effect.⁴

¹ *Hart v. Huckins*, 5 Mass. Rep. 260.

² *Thayer v. Dudley*, 3 Mass. Rep. 296.

³ *Prop. of Monumoi G. B. v. Rogers*, 1 Mass. Rep. 159. *Otis v. Birby et al.* 9 Mass. Rep. 520.

⁴ *Woodward v. Skolfield*, 4 Mass. Rep. 375.

The power of the court is not restricted to cases which have been tried in the Supreme Court, but is extended to cases, where judgment has been rendered in the Court of Common Pleas.

It has been decided,¹ that these statutes do not authorize the granting a review of a judgment, rendered upon the report of referees, under a submission entered into before a justice of the peace, upon the ground, that when a review is granted, the case must be tried upon the review, and must, therefore, be commenced by a writ and declaration. Were a review or new trial to be granted in such case, the court say, they do not perceive, by what course of proceedings, the award of the referees could be set aside. It is worthy of remark, however, that the *second section* of *Stat. 1788. ch. 11.* speaks expressly of *judgments on the reports of referees.* The intention of the statute clearly is, to confer upon the court the power of correcting mistakes in such cases, as well as in those where the reference is had by a rule of court, of an action pending in court; and if justice require it, there seems to be no difficulty in the exercise of the power.

By *Stat. 1791. ch. 17. s. 3.* the Court of Common Pleas is invested with the power of granting reviews of actions, originally commenced before justices of the peace, wherein the defendant has been defaulted, or lost his law. And by *Stat. 1822. ch. 61.* the Court of Common Pleas is vested with the same powers, as the Supreme Court, respecting all civil actions and suits cognizable by justices of the peace, wherein the defendant has been defaulted for want of actual notice

¹ *Dickenson v. Davis*, 4 Mass. Rep. 520. *Stone et al. v. Davis et al.* 14 Mass. Rep. 360.

of the suit, or by some other accident or mistake, with which the justices of the Supreme Judicial Court are by law vested, respecting appeals from judgments rendered by Courts of Common Pleas, and complaints for not entering the same, and respecting the granting of reviews in actions and suits, wherein the defendant has been defaulted, or lost his law.

SECT. II. OF THE PETITION FOR THE REVIEW,
AND PROCEEDINGS THEREON, AND THE EFFECT
THEREOF.

The petition must set forth concisely and distinctly, the several causes, upon which the petitioner rests his claims for a review; and an affidavit by him of the truth of those facts, must be filed, before the court will issue an order of notice to the other party.¹ The petition is then entered upon the docket of the clerk, and the order of notice issued to the other party, calling upon him to appear and shew cause, why the petition should not be granted; if the writ issue without such notice, it will be quashed by the court, as having issued improvidently.²

Upon the hearing of the petition, the petitioner will be confined to the facts therein set forth.³

The petitioner, at the hearing, offers his evidence to prove the facts, and the other party may offer evidence to rebut them, and upon the evidence presented to the court, and the law, the petition will be granted or re-

¹ *Willard v. Ward*, 3 Mass. Rep. 24.

² *Clap v. Joslyn*, 1 Mass. Rep. 129. *Hall v. Wolcott*, 10 Mass. Rep. 218.

³ *Simmons et al. v. Apthorp et al.* 1 Mass. Rep. 99.

fused. And upon the hearing, the affidavit of the petitioner, is admissible to prove facts known only to himself.¹

If the petition be granted, a writ of review will issue from the court, which must be served and returned in the same manner as an original summons.

If the party, against whom the writ of review issues, be not an inhabitant of the Commonwealth, it may be served upon his attorney, who appeared in the original cause, and in real actions in such case, upon the tenant in possession.²

The case will then be tried in the same manner, as if there had been no former trial or judgment.

The party obtaining the review must procure at the trial, attested copies of the papers in the case.

If an execution has already issued in the action, of which a review is prayed, the court will stay the execution on such terms, as they may deem reasonable; a bond with sufficient sureties is generally required, to respond the amount thereof, in case the party fail to support his petition, and to pay such costs, as the respondent may in such case recover.

The proceedings upon a petition for a review, are in most respects similar to those upon a petition for new trial, except in the particulars above stated; and in the Supreme Court, the power of granting reviews is so ample, that in most cases, the remedy by review may be advantageously pursued, instead of obtaining a rehearing by motion for a new trial, the effect being substantially the same.

¹ *Rogers v. Hill*, 4 Mass. Rep. 349.

² Stat. 1786. ch. 66. repealed; but the practice as to the *modes* of proceeding is the same as prescribed by this statute, when reviews were of right.

If a review be granted by the Supreme Court, in an action tried before the Court of Common Pleas, the trial will be had at the bar of the former court.¹ And each party is entitled in the re-trial, to all the evidence used at the former trial, which is not liable to legal objections, or which may not, at the review, be obtained from the same source, in a better and more authentic form.²

Where there are issues both of law and fact, the whole is liable to revision, in the same way, as if no trial had been had, the law by the court, the fact by the jury.³

It was formerly necessary, that cases upon review should be tried upon the same pleadings as the original action ; but by *Stat. 1817. ch. 63.* amendments may be allowed on review, as in other cases.

SECT. III. JUDGMENT ON REVIEW.

On a writ of review, the former judgment cannot be reversed, either in whole or in part, but a new judgment must be entered. If the former judgment were wrong, the plaintiff in review will have judgment to recover back the money erroneously recovered in the first suit, and if the former judgment were right, the defendant in review will have judgment for his costs of review, and may execute his former judgment;⁴ and the order arresting the execution of the first judgment, if any had been passed, would in that case be vacated.

¹ *Keyes v. Stone*, 5 Mass. Rep. 391. *Walker v. Haskell*, 11 Mass. Rep. 177.

² *Gold v. Eddy*, 1 Mass. Rep. 1.

³ *Perry v. Goodwin*, 6 Mass. Rep. 498.

⁴ *Ely et al. v. Forward et al.* 7 Mass. Rep. 25. *Swett et al. v. Sullivan*, 7 Mass. Rep. 342, 348.

If the original plaintiff recover a larger sum upon the review than on the former trial, judgment is only entered for the excess in review; and if part of several defendants review, in such case, the second judgment will be against those only, who sued out the review, the first judgment remaining good against them all.¹

If a party against whom a judgment was recovered upon the first trial, prevail upon the review, he will be entitled to recover the costs, which he ought to have recovered on the first trial, as well as his costs on review.²

Costs on review. Vide Chapter on Costs.³

¹ *Emerson et al. v. Pattee & ux.* 1 Mass. Rep. 482.

² *Durgin et al. v. Leighton,* 10 Mass. Rep. 56.

³ Ante page 318, 319.

CHAPTER XIX.

ARREST OF JUDGMENT.

Time when motion must be made. A motion in arrest of judgment is made after verdict, or default, and before judgment is rendered.¹ And as in our practice, judgments are in all cases rendered, as of the last day of the term, except when specially moved for at an earlier day, motions in arrest of judgment may generally be made at any time, during the term.

Cases in which a motion in arrest of judgment may be made. A motion in arrest of judgment can only be made, on account of some intrinsic defect, apparent on the face of the record, which would render the judgment in the case erroneous,² and which is so apparent, that the court may judge upon the record itself, and the grounds of their judgment be known to their successors.³

After judgment on demurrer, no motion in arrest of final judgment can be entertained, for any exceptions which might have been taken on the demurrer;⁴ it is otherwise, however, in the case of a default, because the judgment is not rendered in so solemn a manner.⁵

Nor will a motion in arrest of judgment lie, for any

¹ *The King v. Holt*, 5 Term. Rep. 436, 445. *Rex v. Hayes*, 2 Stra. Rep. 843, 845.

² 1 Salk. 77. 1 Ld. Ray. 232.

³ Ibid. *Sutton v. Bishop*, 4 Burr. Rep. 2283, 2287.

⁴ *Edwards v. Blunt*, 1 Stra. Rep. 425. *Creswell v. Packham*, 6 Taunt. Rep. 630. S. C. 2 Marsh. Rep. 326. 6 Moore. 209.

⁵ Ibid.

thing that is aided after verdict, or that is amendable at common law, or that is amendable or cured, as a matter of form, by statute.¹

A defendant cannot move in arrest of judgment, for any thing he might have pleaded in abatement;² as for instance, an irregularity in the service of a writ,³ — or for want of an indorser of the writ,⁴ — or that the writ bears *teste* of a justice, who is a party to the suit.⁵

If there be a misjoinder of counts, and a verdict for the plaintiff on those that are well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment.⁶

But where there are several counts in a declaration and some of them are bad, upon a general verdict, judgment will be arrested.⁷ The verdict, however, may be amended by the judge's notes, so as to apply to the good counts; and it is not too late, on the motion in arrest of judgment, for the plaintiff to move for such amendment.⁸

And though the misjoinder of counts be bad, yet if one of them be stricken out, by leave of court, it will be considered as if never inserted.⁹ And if a general verdict be returned in such a case, the plaintiff may, at any time during the term, on motion, have leave to amend the verdict, and enter it on any count, on which

¹ 2 Tidd's Pract. 819.

² 2 Black. Rep. 1120.

³ *Gilbert et al. v. Nantucket Bank*, 5 Mass. Rep. 97.

⁴ *Ibid.*

⁵ *Prescott v. Tufts*, 7 Mass. Rep. 209.

⁶ *Kightly v. Birch*, 2 Maule & S. Rep. 533.

⁷ *Benson v. Swift*, 2 Mass. Rep. 50. *Stevenson v. Hayden*, 2 Mass. Rep. 406. *Barnard v. Whiting et al.* 7 Mass. Rep. 358. *Sullivan v. Holker*, 15 Mass. Rep. 374. *Dryden v. Dryden*, 9 Pick. Rep. 546.

⁸ 9 Cowen. Rep. 151. 1 Johns. Rep. 506. 11 Johns. Rep. 100.

⁹ *Prescott v. Tufts et al.* 4 Mass. Rep. 146.

the evidence by law, would, at the trial, have entitled him to recover, and may have leave to strike out of his declaration, any defective counts.¹

Judgment will be arrested, if it appear that there was no writ or process, to give the court jurisdiction, but that proceedings have been carried on by consent.²

If an action, local in its nature, be sued in a wrong county, the judgment may be arrested.³

If an indictment, or a declaration upon a statute, do not conclude "*contra formam*," &c. judgment may be arrested.⁴ And in a prosecution on a private statute, if the statute be not recited, the judgment may be arrested.⁵

Judgment against either plaintiff or defendant, may be arrested; as where upon a complaint under *Stat. 1797. ch. 63.* against the owner of a mill, for flowing land of the complainant, if the respondent, claiming to be wholly exempt from the payment of damages, do not plead to the complaint, so that the issue may be tried at the bar of the court, it must be tried by the sheriff's jury, and they are bound to give to the complainant some damages, and if they do not, judgment will be arrested.⁶

How a motion in arrest of judgment must be made. By a rule of the Court of Common Pleas,⁷ motions in arrest of judgment must be made in writing, and the causes thereof must be specified therein.

¹ 32d Rule C. C. Pleas. Appendix B.

² 1 Sell. Pract. 501.

³ *Robinson v. Mead*, 7 Mass. Rep. 353. But vide Yelv. 12a. note.

⁴ *Commonwealth v. Northampton*, 2 Mass. Rep. 116.

⁵ *Commonwealth v. McCurdy*, 5 Mass. Rep. 324.

⁶ *Vandusen v. Comstock*, 3 Mass. Rep. 184.

⁷ 24th Rule C. C. Pleas. Appendix B.

CHAPTER XX.

VIEW.

In what cases. By Stat. 1807. ch. 140. s. 8. it is provided, that in all cases relating to real estates, either party may have a jury to *view* the place in question, if the court shall be of the opinion, that such *view* is necessary to a just decision: *provided*, the party moving therefor advance such a reasonable sum to the jury, as the court shall order, to be taxed against the adverse party, in the event of a decision of the cause against him, on its merits, or through the default of the adverse party.

The only cases, in our practice, in which a *view* is allowed, are those mentioned in the foregoing statute. On the trial of an indictment for murder, the counsel for the prisoners moved that the jury should *view* the place, where the crime was alleged to have been committed; but the court refused the application.¹

Mode of obtaining. The party desiring the *view*, should move the court therefor, either immediately before, or during the trial. If granted, the court order an officer to be sworn, to take charge of the jury, accompany them to the premises, and return them to the court. The parties or their counsel may accompany the jury. Upon the return of the jury, the trial proceeds, as in common cases.

¹ *Commonwealth v. Parker et al.* 2 Pick. Rep. 550.

CHAPTER XXI.

PROCEEDINGS AGAINST BAIL, AND AGAINST
SHERIFF.

The plaintiff having prosecuted his suit to final judgment and execution, delivers the execution to an officer.

This execution must be levied either on the property or person of the defendant, if either can be found within the officer's precinct. If it be so levied, it is then, at the time appointed therein, returned by the officer, to the court from which it issued, as *satisfied*, and the suit is thereby brought to an end.

But if on the service of the writ, the officer took a bail bond, then if the defendant cannot be found, on the execution, the officer returns it "*non est inventus*," that is, that he has made diligent search for the goods and person of the defendant, but could find neither. The plaintiff may then call upon the officer, for the bail bond, and resort to his remedy against the bail.

Form of proceedings against bail. It has already been stated,¹ that by *Stat. 1784. ch. 10.* a remedy is given to the plaintiff in an action, against the bail taken on the original writ, by *scire facias*. And this form of proceeding is the one most usually resorted to, but it is cumulative merely, and does not take away or supersede, the remedy by action of *debt* on the bail bond.² Indeed this latter must be the

¹ Vide ante page 73, 187.

² *Lane v. Smith*, 2 Pick. Rep. 281. *McRae v. Mattoon*, 10 Pick Rep. 49.

only remedy, where the bail are not within the reach of the process of the court. The bail, however, would be entitled to the same defence in an action of *debt*, which the statute gives them on *scire facias*.¹

In *New Hampshire* it has been decided, that *debt* will not lie on a bail bond; that the only remedy is by *scire facias*.²

Before any proceedings can be had against bail on their bond, an execution must be issued against the principal, and be returned “*non est inventus*.” And the suit against bail, whether *debt* or *scire facias*, the statute requires to be commenced, within *one year* from the rendition of judgment against the principal, or the bail is discharged.

The execution against the principal should be directed to the sheriff of the county, where the writ was served, and a return of “*non est*” by him, will lay the foundation for a *scire facias* against the bail, although the principal may be in another county.³

A return by the sheriff, that the judgment debtor has enlisted in the service of the United States, is not sufficient to charge the bail.⁴ But such an enlistment will not constitute a defence for the bail, in a suit against them.⁵

It is not actually necessary, that the principal should be arrested, before he makes a bail bond; and in the action against the bail, the arrest need not be stated,

¹ *Lane v. Smith*, 2 Pick. Rep. 281. *McRae v. Mattoon*, 10 Pick. Rep. 49. *Bean v. Parker et al.* 17 Mass. Rep. 591.

² *Pierce v. Reed*, 2 N. Hamp. Rep. 359.

³ *Brown v. Wallace*, 7 Mass. Rep. 208.

⁴ *Herrick v. Richardson*, 11 Mass. Rep. 234.

⁵ *Sayward et al. v. Conant et al.* 11 Mass. Rep. 146. *Harrington v. Dennie*, 13 Mass. Rep. 93.

for it is not traversable.¹ The arrest could not be proved, but by the return of the officer, and such return cannot be contradicted by parol.

If the return be false, the remedy is against the officer making it. The bail bond also admits as a fact, the arrest of the principal, and this fact cannot afterwards be denied, by the parties to the bond.²

The bond, however, must be actually executed by the principal, as well as the sureties, though perhaps the rule is different in England,³ and must be taken, before the return of the writ.⁴

The becoming bail with us, is not a matter of record, but a matter *in pais*, and proveable before a jury; and, therefore, a plea denying the existence of any *record*, by which the party became bail, is bad. The act giving the remedy by *scire facias*, does not make the bail bond a part of the record, for any other purpose, than to support this proceeding.

It is no sufficient defence to a *scire facias* against bail, that a former and original execution, was not delivered to an officer, before it was returnable;—nor that “*non est inventus*,” was not returned on that execution;—nor that no execution was delivered to an officer, within *thirty days* after the rendition of the judgment;—nor that the principal abode in the county, ready to be taken on the execution, until the first one was returnable. Nor is it necessary, that the execution should be put into the hands of the officer, any particular number of days before it is returnable.⁵ If

¹ 1 Stra. Rep. 643. 2 Lev. 107.

² *Bean v. Parker et al.* 17 Mass. Rep. 591.

³ Ibid.

⁴ 1 Ld. Ray. 352.

⁵ *Stevens v. Bigelow*, 12 Mass. Rep. 434.

the officer is willing to return, that he made diligent search for the principal, and that he could not be found, that is sufficient; and this return is conclusive on the bail, in the action of *scire facias* against them. If the return be false, the bail have their remedy against the sheriff.

The plaintiff is under no obligation to deliver the execution to the officer, at the request of the bail.¹

The bail may take their principal at any time, even in his own house, or attending the court.² And bail may depute another, to take and surrender their principal; for the right to surrender, results from the relation between bail and principal, and is to be effected, as circumstances shall require, and is not a personal power, to be executed by bail only.³

It is said, that after bail have taken their principal, they cannot depute the custody of him to another, without his consent.⁴ The bail may take their principal, out of the jurisdiction of the court, in which the judgment was rendered against the principal, and even in a different state.⁵ After demand, they may break the outer door, and may take their principal on Sunday, and confine him till the next day, and then surrender him.⁶

The bail may surrender their principal to the officer holding the execution, before its return, and this will save the bond at law.⁷

¹ *Stevens v. Bigelow*, 12 Mass. Rep. 434.

² 1 Sell. Pract. 170.

³ 7 Johns. Rep. 145. 1 Johns. Cas. 304.

⁴ 1 Sell. Pract. 170.

⁵ 7 Johns. Rep. 145.

⁶ *Ibid.*

⁷ *Champion v. Noyes*, 2 Mass. Rep. 481. *Walker v. Haskell*, 11 Mass. Rep. 177. *Rice et al. v. Carnes*, 8 Mass. Rep. 490.

The bond is also saved, if the principal die before the return of the execution; for it has become impossible by inevitable accident, to make the surrender; but if the principal die after the return of the execution, this will not exonerate the bail.¹

The statute giving the remedy against bail, provides that they may surrender the principal in court, at any time pending the action against him, and thereby discharge themselves; and this surrender may be by the principal himself, or by the attorney of the bail,² or by the executor, or administrator of the bail.³

But the surrender must be matter of record, and cannot be proved by parol.⁴

By *Stat. 1817. ch. 146.* it is provided, that bail may commit their principal to the jail of the county, where the arrest was made, or where the writ is returnable, and by leaving an attested copy of the writ, on which the arrest was made, and the return thereon, with the jailor, and giving notice to the plaintiff, or his attorney, within *fifteen days*, and paying the costs of the *scire facias*, if one have issued; — and by doing this, the bail will be forever discharged. And if the principal be confined in such jail for crime, the bail may exonerate themselves, by filing a copy of the writ, and giving notice, although the principal be convicted of a crime, and removed so that he cannot be taken on the execution, before judgment recovered against him.⁵

If a *scire facias* have been commenced against the

¹ *Champion v. Noyes*, 2 Mass. Rep. 481. *Walker v. Haskell*, 11 Mass. Rep. 177. *Rice et al. v. Carnes*, 8 Mass. Rep. 490.

² *Coolidge et al. v. Cary*, 14 Mass. Rep. 115.

³ *Wheeler v. Wheeler*, 7 Mass. Rep. 169.

⁴ *Whitton v. Harding*, 15 Mass. Rep. 535.

⁵ *Bigelow v. Johnson et al.* 16 Mass. Rep. 218.

bail, they may be discharged, by the surrender of their principal, at any time before final judgment, rendered against them, and paying the costs of the *scire facias*; but after final judgment, they cannot surrender.¹

And if the debtor is confined in the state prison for crime, he may be brought up by *habeas corpus*, for the purpose of being surrendered, in discharge of his bail, even though the creditor cannot take him.² So if he be in custody on a charge of felony, it is said to be almost a matter of course, and what the bail are entitled to ask *ex debito justitiæ*.³

But it is only by surrendering him, that the bail can be exonerated, and if he be so confined, that he cannot be surrendered, the bail are not thereby discharged.⁴

The bail are not discharged, by surrendering their principal on the *scire facias*, until the costs thereof are paid.⁵

The bail are only responsible for the demands included in the writ, at the time the bond was given, and if any thing be done by the plaintiff, to increase their liability, they will be discharged;—as if new counts be filed after the entry of the action, which do not appear to be for the same cause of action, as the original counts, and judgment be taken thereon, the bail will be discharged.⁶ So if the action be submitted, *with all demands* between the parties, the bail will

¹ *Rice et al. v. Carnes*, 8 Mass. Rep. 490. *Harrington v. Dennie*, 13 Mass. Rep. 93.

² *Bigelow v. Johnson et al.* 16 Mass. Rep. 218.

³ *Sharp v. Sheriff*, 7 Term. Rep. 227.

⁴ *Parker v. Chandler*, 8 Mass. Rep. 264.

⁵ *Bartlett v. Falley*, 5 Mass. Rep. 373.

⁶ *Willis v. Crooker*, 1 Pick. Rep. 204.

be discharged; but not by a submission of the action alone, with leave to the defendant, to set off any claims he may have against the plaintiff's demand.¹

On a *scire facias* against bail, they may plead *non est factum* to the bond, or *nul tiel record* to the recovery against the principal. They may plead in bar, also, that an *alias* execution issued, on which the principal had been arrested, — or that the judgment against the principal has been satisfied, released, or discharged.² And although the return of “*non est*,” by the officer, is, in general, conclusive, in the *scire facias* against bail, yet where the return has been procured, by the fraud of the plaintiff, this may be pleaded in bar of the *scire facias*.³

The bail may also shew, in answer to the *scire facias*, whatever will render the arrest unlawful, or ineffectual, by operation of law.⁴

Liability of sheriff, in taking bail. If the officer, in taking bail, comply with all the requisitions which have been stated,⁵ neither he, nor the sheriff can, in any event, be liable.⁶

Not delivering the bail bond. If the officer refuse to deliver the bail bond to the plaintiff, upon reasonable demand, the plaintiff, as soon as “*non est*” is returned upon the execution, may bring an action on the case against the sheriff, and recover the whole amount of the original judgment.⁷

¹ *Bean et al. v. Parker*, 17 Mass. Rep. 591. *Hill v. Hunnewell*, 1 Pick. Rep. 192.

² *Harrington v. Dennie*, 13 Mass. Rep. 93.

³ *Stevens v. Bigelow*, 12 Mass. Rep. 434. *Winchell v. Stiles*, 15 Mass. Rep. 230.

⁴ *Harrington v. Dennie*, 13 Mass. Rep. 93.

⁵ Ante Book I. Chap. XV.

⁶ *Rice et al. v. Hosmer*, 12 Mass. Rep. 127.

⁷ *Simmons v. Bradford*, 15 Mass. Rep. 82.

Taking a defective bail bond, or insufficient bail. If the officer, in taking bail, fail to comply with any of the requisitions, the plaintiff may treat the proceedings, as a nullity, and proceed as in the former case, as for not delivering the bail bond.¹

If the insufficiency be in the *number*, or the *reasonableness* of the sureties, then in addition to the former remedy, the plaintiff, instead of treating the proceedings as a nullity, may bring *scire facias* against such bail, as were taken, and at the same time, an action on the case, against the sheriff, for the default of the officer, in taking *insufficient bail*, and for a *false return*.²

It may be remarked of these two courses of proceedings against the sheriff, — that in the former, where the action is brought for not delivering the bail bond, it has been holden, that the amount of the sheriff's liability, is that of the original judgment in all cases, and that no evidence in mitigation of damages will be received,³ while in the cases, where the latter form of remedy, by action, for taking insufficient bail, and for false return, has been adopted, evidence in mitigation of damages has been received, and verdicts giving nominal damages merely, have been sustained.⁴ So long, therefore, as this distinction is admitted, the better course, in all cases where there is a defect in

¹ *Simmons v. Bradford*, 15 Mass. Rep. 82.

² *Sparhawk v. Bartlett*, 2 Mass. Rep. 188. *Long v. Bradish*, 9 Mass. Rep. 480. *Rice et al. v. Hosmer*, 12 Mass. Rep. 127. *Mather v. Green*, 17 Mass. Rep. 60. *Young v. Hosmer*, 11 Mass. Rep. 89. *Rayner v. Bell*, 15 Mass. Rep. 377.

³ *Simmons v. Bradford*, 15 Mass. Rep. 82.

⁴ *Weld, v. Bartlett*, 10 Mass. Rep. 470. *Young v. Hosmer*, 11 Mass. Rep. 89. *Nye v. Smith*, 11 Mass. Rep. 188. *Rice et al. v. Hosmer*, 12 Mass. Rep. 127.

the officer's taking bail, seems to be, to treat the proceedings as a nullity, and proceed as for not delivering the bail bond.

In the English practice, the proceeding against the sheriff, is by *attachment*, and not by action; and the amount of his liability, that of the original debt and costs.¹

Time of sheriff's liability. With us, the sheriff, like the bail, is not liable at all, until after a return of "*non est*" against the defendant. The limitation of actions against him, is *four years* from the return of "*non est*," upon the execution against the defendant.²

¹ *Heppel v. King*, 7 Term. Rep. 370. *Foulds v. McIntosh*, 1 H. Black. Rep. 233.

² Stat. 1796. ch. 71. *Mather v. Green*, 17 Mass. Rep. 60.

A P P E N D I X .

A P P E N D I X .

A .

RULES OF THE SUPREME JUDICIAL COURT.

I. ADMISSION OF COUNSELLORS AND ATTORNIES, IN THE SUPREME JUDICIAL COURT.

1. ANY person may be admitted an attorney of this court, who shall have had a liberal education and regular degree, at some public college, and shall afterwards have commenced and pursued the study of the law, in the office and under the instruction of some counsellor of this court, for three years; and shall afterwards have been admitted an attorney of the Court of Common Pleas, for the county, in which such counsellor, with whom he last studied the law as aforesaid, shall dwell; having first been recommended by the bar of the said county, to the said Common Pleas, as having a good moral character, and as suitably qualified for such admission; and shall afterwards have practised law with fidelity and ability, in some Court of Common Pleas, within the state, for the term of two years, and shall then be recommended by the bar for admission as an attorney of this court, when holden for the county, in which the person so recommended shall dwell. 6 Mass. Rep. 382.

2. Any person not having a liberal education and a regular degree as aforesaid, who shall have commenced and pursued the study of the law, in the office of some counsellor as aforesaid, for the term of five years, shall be considered as having a qualification for admission, equivalent to the having had a liberal education and a regular degree as aforesaid.—*Ibid.*

3. Any person having a liberal education and a regular degree as aforesaid, who shall afterwards have commenced and pursued the study of the law in any other state, in the office of an attorney of the highest judicial court of such state, for one year at the least, and afterwards shall pursue the study of the law, in the office of some counsellor of this court, for the term of two years, shall be considered as having a qualification for admission, equivalent to the having commenced and pursued the study of the law for three years, in the office, and under the instruction of some counsellor of this court.—*Ibid.*

4. Any person not having a liberal education and a regular degree as aforesaid, who shall have commenced and pursued the study of the law in any other state, in the office of an attorney of the highest judicial

court of such state, for the term of two years at the least, and shall afterwards have pursued the study of the law, with some counsellor of this court, for the term of three years, shall be considered as having a qualification for admission, equivalent to the having had a liberal education and a regular degree as aforesaid, and to the having pursued the study of the law for three years, in the office of some counsellor of this court.—*Ibid.*

5. The bar shall not recommend for admission as an attorney, any person, either to any Court of Common Pleas, or to this court, unless he be qualified for such admission, agreeably to the provisions of these rules. But the bar may recommend, for admission as an attorney to the Common Pleas, any person now duly qualified by the rules hereby repealed, for examination and admission as an attorney of this court; and further, the bar may also recommend to the Court of Common Pleas, for admission as an attorney thereof, any person, who before the establishment of these rules, had commenced and is now pursuing the study of the law, with some counsellor of this court, when such person would, by virtue of the rules hereby repealed, be qualified for examination and admission, as an attorney of this court.—*Ibid.*

6. If the bar of any county, shall unreasonably refuse to recommend, either to this court, or to any Court of Common Pleas, for admission as an attorney, any person suitably qualified for such admission, — or if after the recommendation of the bar, the Common Pleas shall unreasonably refuse to admit as an attorney, the person so recommended, such person, submitting to an examination by one of the justices of this court, producing to him sufficient evidence of his good moral character, may be admitted an attorney of this court, on the certificate of such justice, that he is duly qualified therefor, and has pursued the study of the law, agreeably to the provisions of these rules.—*Ibid.*

7. Any person, who shall have been admitted an attorney of the highest judicial court of any other state, in which he shall dwell, and afterwards shall become an inhabitant of this state, may be admitted an attorney or counsellor of this court, subject to the discretion of the justices thereof, after due inquiry and information concerning his moral character, and professional qualifications.—*Ibid.*

8. Any person who now is, or who shall be an attorney of this court, having practised law therein with fidelity and ability, as an attorney thereof for two years, may be admitted a counsellor of this court, when holden for the county, in which such attorney shall dwell, on the recommendation of the bar of such county, or without such recommendation, if it be unreasonably refused; unless such person was admitted an attorney of this court, because he had been unreasonably refused admission as an attorney of the Court of Common Pleas, in which case, he shall not be recommended nor admitted as a counsellor of this court, until he has practised law as an attorney thereof, for the term of four years.—*Ibid.*

9. All issues in law and in fact, and all questions of law, arising on writs of error, *certiorari*, and *mandamus*, on special verdicts, on motions for new trials, and in arrest of judgment, shall be argued only by the counsellors of this court. And the counsellors of this court may also practise as attornies.—*Ibid.*

10. When any person shall have been recommended to this court, for admission to practise as a counsellor or attorney, agreeable to the provision of the rules of this court, and it shall appear to the court, that such person is unable to attend, on account of sickness or other sufficient cause, he may, on producing a recommendation of the bar of the county where he dwells, to this court in any other county, at the discretion of the court, be admitted to practice; any thing in the said rules to the contrary notwithstanding.—11 Mass. Rep. 406.

11. All recommendations by the bar, of gentlemen for admission to practise as counsellors or attornies, shall be presented to the court; on the morning of the second day of the term; and the gentlemen so recommended shall attend on said morning, at the opening of the court; and that no recommendation shall be received and acted upon, on any other day during the term, unless for special reasons, satisfactory to the court, they shall otherwise order.—12 Mass. Rep. 418.

12. Hereafter any gentleman, who is duly qualified for admission as an attorney or counsellor of this court, may be admitted in any county within the Commonwealth, where the court shall be holden by three or more justices thereof, on producing a certificate of recommendation, according to the rules heretofore established, of his qualifications and good moral character, from the bar of the county, in which he may have practised;—provided that no term of the Supreme Judicial Court, at which by law he could be admitted, shall be to be held in or for the county, in which he is a practitioner, for three months after he shall be entitled by the rules aforesaid, to be admitted.—15 Mass. Rep. 222.

II. RULES FOR THE REGULATION OF PRACTICE IN CHANCERY.

1. In suits and proceedings, under the late statute for giving further remedies in equity, the court adopt, as the outlines of their practice, the practice of the English courts of equity, so far as the same is not repugnant to the constitution and laws of the Commonwealth, nor to the rules which the court shall, from time to time, make, for simplifying the proceedings, and preventing unnecessary delay and expense.—14 Mass. Rep. 466.

2. All unnecessary prolixity and repetition in the pleadings, shall be avoided. The bill shall contain a full, clear, and explicit statement of the plaintiff's case, and conclude with a general interrogatory. But the plaintiff may, when his case requires it, propose specific interrogatories; and may allege, by way of charge, any particular fact for the purpose of putting it in issue.—*Ibid.*

3. Upon the general interrogatory contained in the bill, the defendant shall be required to answer fully, directly and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated.—*Ibid.*

4. The original process, to require the appearance of the defendant, (when the bill is not inserted in an original writ, as provided by the statute,) shall be a *subpœna* in the form following:

COMMONWEALTH OF MASSACHUSETTS.

ss.

To A. B. of

(addition.)

Greeting.

We command you that you appear before our Supreme Judicial L. s. Court, next to be holden at , within and for our said county of , on the Tuesday of next, then and there to answer to a bill of complaint exhibited against you, in our said court, by C. D. of (addition,) and to do and receive what our said court shall then and there consider in this behalf. Hereof fail not, under the pains and penalties in the law, in that behalf provided. Witness J. P. Esquire, the day of , in the year of our Lord

E. F. Clerk.

The writ shall bear teste of the Chief Justice, or first justice, who is not a party to the suit; and shall be under the seal of the court, and signed by the clerk: it shall be served by the same officers, and in the same manner, as other original writs of summons are by law to be served.—*Ibid.*

5. The bill may be filed in the clerk's office in vacation, and a *subpœna* shall thereupon issue of course, upon the application of the plaintiff, or his solicitor, returnable at the then next term of the court. The *subpœna* in such case shall be served, *fourteen days* at least before the day, on which it is returnable. When the bill is filed in term time, the court will order the *subpœna* returnable on a certain day in the same term, or at the ensuing term, as the case may require. But the defendant shall never be compelled to appear, nor subjected to any penalty for not appearing, unless the *subpœna* be served upon him *fourteen days* at least, before the day on which it is returnable.—*Ibid.*

6. The plaintiff may, in all cases, cause the defendant to be served with a copy of the bill, at the same time that the *subpœna* or other original writ is served, and by the same officer, by whom such writ is served; the copy to be delivered to the defendant, or left at the place of his last and usual abode, and to be attested by the clerk, unless the bill is inserted in a writ of attachment or summons; in which case, the copy shall be attested by the officer by whom the same is served. And

when such copy of the bill shall have been duly served on the defendant, *sixty days* or more, before the day on which the writ is returnable, the defendant shall be held to plead, demur, or answer, on the return day of the writ, unless for good cause shewn, the court shall allow further time for that purpose.—*Ibid.*

7. When the bill is filed in term time, and a *subpœna* is issued returnable at the ensuing term, the defendant shall file his plea, demurrer, or answer, in the clerk's office, at such time in the vacation, as the court shall order, not less than *sixty days* after service on him of the *subpœna*, and of an attested copy of the bill: *provided*, that he be served with a copy of such order, at the time of the service of the *subpœna*. And when an answer is so filed, the plaintiff may file his replication in the clerk's office, in the same vacation; and upon giving notice of such replication to the defendant, not less than *thirty days* before the ensuing term, the parties may proceed to take the examination of their witnesses, so that the cause may be heard and determined at the ensuing term. Or if the plaintiff shall elect to proceed to a hearing of the cause, on the bill and answer, he may give notice thereof to the defendant, not less than *thirty days* before the ensuing term, and the cause shall be then heard and determined accordingly.—*Ibid.*

8. If the defendant, being duly served with the *subpœna*, or other original process, shall neglect to enter his appearance on the return day thereof; and if it shall appear to the court, by the return of the officer or otherwise, that he had personal notice of the suit, *fourteen days* at least before such return day, his default may be recorded, and the bill may be taken *pro confesso*.—*Ibid.*

9. The defendant's answer may be sworn to, before any justice of the peace for the county where the defendant may be; and in such case, it shall be enclosed and sealed by the justice, and returned unopened into the clerk's office. The answer may be then opened by the clerk, for the inspection of the plaintiff, that he may reply, or proceed thereon, as he shall be advised.—*Ibid.*

10. All testimony shall be by depositions, to be taken, if within the Commonwealth, before any justice of the peace, being either a judge of any Court of Common Pleas, a judge of probate, or a counsellor of this court, not interested, nor of counsel in the cause; and if without the Commonwealth, the depositions shall be taken before commissioners, to be appointed by the court, or by any justice thereof in vacation.—*Ibid.*

11. The examination of witnesses shall be had upon interrogatories, to be filed in the clerk's office, by the party producing the witness; and upon such cross-interrogatories, as may be filed by the adverse party. The party filing the interrogatories, shall give notice thereof to the adverse party, or to his solicitor or counsel, *seven days* at least, before taking out the commission, and *one day* more, for every *ten miles* that such party, or his solicitor or counsel, shall live from the clerk's office:

and when the witness to be examined, is within the Commonwealth, the clerk shall issue of course, a commission or order, with a title of the cause, and of the court in which it is pending, authorizing any of the magistrates mentioned in the preceding rule, to take the examination of the witness, upon the interrogatories annexed to the order.—*Ibid.*

12. All the notices, required by these rules to be given to the plaintiff, may be given to his solicitor or counsel; and all such notices, to be given to the defendant, if after he has entered his appearance, may be given to his solicitor or counsel.—*Ibid.*

13. Whenever it shall become necessary or proper, to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be formed by the parties; containing a distinct affirmation of the points in question, and a denial or traverse thereof; and the issue thus formed and joined, will be submitted to a jury in the same court, in which the suit may be depending.—*Ibid.*

III. REGULÆ GENERALES.

1. *Of the entry of civil actions.* No civil action shall be entered after the first day of the term, unless by consent of the adverse party, and by leave of the court; or unless the court shall allow the same, upon proof that the entry was prevented by inevitable accident or other sufficient cause.

2. *Of double pleading.* In all actions originally brought in this court, and in all actions brought by appeal from the Courts of Common Pleas, wherein the defendant may have reserved leave to plead anew, leave to plead double, will be granted of course, on application to the clerk, and entered on his docket at any time within *two days* after the action is entered, the day of the entry to be reckoned as one day: and if any one or more of the pleas so filed, shall appear to the court to be unnecessary or improper, the same will be struck out, at the motion of the plaintiff or demandant: and no leave to plead double will be granted, after the expiration of the said *two days*, unless by consent of the plaintiff or demandant, or unless the court shall allow the same, upon proof that the party was prevented from making the motion, by inevitable accident, or other sufficient cause.

3. *Rules to plead, &c.* Either party may obtain a rule on the other, to plead, reply, rejoin, &c. within a given time, to be prescribed by the court; and if the party so required, neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court, for good cause shewn, shall enlarge the rule.

4. *Of continuances to amend, or plead double, &c.* When an action shall be continued, with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c. if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office, by the middle of the vacation, after

the term when the order is made ; and in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c. as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require ; unless the court, for good cause shewn, shall allow further time for filing such amendment or other pleadings.

5. *Of the time, within which special pleas must be filed.* In all actions brought to this court by appeal, the defendant or tenant, if he intend to plead specially, shall file his plea within *two days* after the action is entered, (the day of the entry to be reckoned as one,) unless it shall appear to the court, that the matter of the plea, or the circumstances of the case are such as to require a longer time ; in which case the court will, on motion, assign a time for the filing of the plea : and if such plea be not filed within the time prescribed by this rule, or to be assigned by the court as aforesaid, the defendant will not be allowed to plead specially, but will be required to plead the general issue, or to file a general demurrer ; and on failing so to do, he will be defaulted.

6. *Of frivolous demurrers, intended for delay.* If a demurrer shall be filed at a time when the court is held by one judge only, and the same shall be objected to by the adverse party, as frivolous or immaterial, and intended for delay ; and the counsel or attorney for the party demurring shall nevertheless insist on such demurrer ; and if on the hearing of the cause on such demurrer, the same shall appear to the court to be frivolous or immaterial, and intended for delay ; the counsel or attorney, who so insisted on the demurrer, shall be struck off from the roll, and shall never afterwards be allowed to practise in this court ; unless, upon good cause shewn, the court shall think fit to restore him.

7. *Of attorneys entering their names on the docket, &c.* Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the clerk's docket, and in default thereof a nonsuit may be entered ; and within *two days* after the entry of the action or appeal, the attorney of the defendant or respondent shall cause his name to be entered on the same docket, as such attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party. And until such notice of the change of an attorney, all notices given to, or by the attorney first appointed, shall be considered in, all respects as notice to, or from his client, excepting only such cases, in which by law the notice is required to be given to the party personally. Provided however, that nothing in this rule contained shall be construed to prevent either party in a suit from appearing for himself, in the manner provided by law ; and in such case the party so appearing shall be

subject to all the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

8. *Of amendments.* Amendments in matters of *form* will be allowed as of course on motion; but if the defect or want of form be shewn as cause of demurrer, the court will impose terms on the party amending.

9. *Of amendments.* Amendments in matters of *substance* may be made, in the discretion of the court on payment of costs, or on such other terms as the court shall impose; but if applied for after joinder of an issue of fact or law, the court will, in their discretion, refuse the application, or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case require it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration and for the same cause of action.

10. *Of opening and filing depositions.* All depositions shall be opened and filed with the clerk, at the term for which they are taken; and if the action in which they are to be used shall be continued, such deposition shall remain on the files, and be open to all objections when offered on the trial, as at the term at which they were opened; and if not so left on the files, they shall not be used by the party, who originally produced them: but the party producing a deposition may, if he see fit, withdraw it, during the same term in which it is originally filed, in which case it shall not be used by either party.

11. *Of depositions taken without the state.* The court will grant commissions to take the depositions of witnesses without the state, and will appoint the commissioners: and either party may, on application to the clerk in vacation, obtain a like commission; which commission in the latter case shall be directed to any Justice of the Peace, Notary Public, or other officer legally empowered to take depositions or affidavits, in the state or country where the deposition is to be taken, unless the parties shall agree on commissioners. And in each case, the deposition shall be taken upon interrogatories to be filed by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party, the whole of which interrogatories shall be annexed to the commission. And the party applying for the commission shall, in each case, file his interrogatories in the clerk's office, and give notice thereof to the adverse party, or to his attorney, *seven days* at least before taking out the commission, and *one day* more for every *ten miles* that such party or his attorney shall live from the clerk's office. And no deposition taken without the state by force of the statute in that case provided, and without such commission, shall be admitted in evidence, unless it shall appear that the adverse party or his attorney had sufficient notice of the taking thereof, and opportunity to cross-examine the witness, or that, from the circumstances of the case, it was impossible to give such notice. And when a deposition shall be taken and certified by any person as a Justice of the Peace, or other officer as aforesaid, by

force of such commission, if it shall be objected that the person so taking and certifying the same was not such officer, the burthen of proof shall be on the party so objecting; and if a like objection be made to a deposition taken without such commission, it shall be incumbent on the party producing the deposition, to prove that it was taken and certified by a person duly authorized, according to the statute before mentioned.

12. *Of depositions taken in term time.* Depositions may be taken for the causes and in the manner by law prescribed in term time, as well as in vacation; provided they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time or place than is above provided, unless the court upon good cause shewn, shall specially order the deposition to be taken.

13. *Of motions for a continuance.* No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. And no counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit, may be disproved by the party objecting to the continuance. And no action shall be continued on such motion, if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence, on the trial, in like manner, as if the witness were present and had testified thereto; and such agreement shall be made in writing, at the foot of the affidavit, and signed by the party, or his counsel or attorney. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper, or other evidence that might be used on the trial.

14. *Of costs upon a continuance.* When an action is continued at the motion of either party, at the term when it might otherwise have been tried, the party making the motion shall pay to the adverse party all his costs incurred at that term, in procuring the attendance of witnesses; unless the continuance is ordered on account of some unfair advantage taken by the adverse party, or of some other fault or misconduct on his part; or unless when the party making the motion shall have given notice thereof, with a statement of the grounds of such motion to the adverse party, or his attorney, in such season, before the sitting of the court, as might have prevented the attendance of the witnesses, or when it shall appear that the ground of the motion was not seasonably known

to the party making it; and the costs thus paid shall not be included in the bill of costs of the party receiving them, if he should finally prevail in the suit.

15. *Of other terms of a continuance.* The preceding rule will not prevent the court from imposing any other and additional terms on the party moving for a continuance, when the justice of the case shall require it; neither shall it be construed to prevent the party, to whom such previous notice may have been given, from procuring the attendance of his witnesses, if he shall think fit to oppose the motion for a continuance. And in such case, if the motion be granted, the costs for such witnesses shall be allowed in the bill of costs for the said party, if he should finally prevail in the suit.

16. *Of the verification of facts, on which a motion is grounded or opposed.* The court will not hear any motion grounded on facts, unless the facts are verified by affidavit, or are apparent from the record, or from the papers on file in the case, or are agreed and stated in writing to be signed by the parties, or their attorneys; and the same rule will be applied as to all facts relied on, in opposing any motion.

17. *Of bringing money into court.* In all cases in which money may be brought into court upon the common rule, as it is called, if the plaintiff shall not accept the same, and if upon the trial the verdict shall be for the defendant, the plaintiff shall not be liable for any costs incurred before the time of bringing the money into court, but only for the costs incurred after that time; and the terms of the rule shall be altered accordingly.

18. *Of trials in the order of the docket.* All civil actions shall be heard and tried in the order in which they stand on the docket; unless the court shall, upon good cause shewn, postpone any trial to a time later than that in which it would come in course. Provided, however, that any one action may, with the consent of all the parties concerned, and with the leave of the court, be substituted for another action standing earlier on the docket; but in such case, the said action which stood earliest shall take the place of the one which is substituted for it, and shall be tried when the latter would have come on in course, if no such change had taken place. And no cause will be continued, even by consent of parties, unless for good cause shewn.

19. *Of the time, within which motions for a continuance shall be made.* When the court is held by one judge for the trial of causes by the jury, all motions for the continuance or postponement of any civil action shall be made on the first day of the term, or on the first day after the entry of the action, unless prevented by inevitable accident or other sufficient cause; or unless the cause or ground of the motion shall first exist, or become known to the party, after that day; in which cases the motion shall be made as soon afterwards, as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the mo-

tion shall not be allowed any costs, for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

20. *Same subject.* Provided, however, and it is further ordered, that when the court shall be held by one judge as aforesaid, in any law term, after the determination of the law questions, the first day of the sittings for the trial of causes by the jury shall be considered as the first day of the term, as to any thing contained in the preceding rule ; and provided, also, that in the county of Suffolk, such motion may be made within the first *four days* of the sitting of the court, with the like effect as if made on the first day of the term, or of the sittings as aforesaid. But this rule shall not be construed to prevent the making of any such motion, at any earlier time during the same term, when the party is prepared to make it.

21. *Of the days in term for motions, reports of referees, petitions, &c.* When the court is held by one judge as aforesaid, in those counties, in which the court is usually in session for the trial of causes by the jury more than two weeks, all motions, reports of referees, petitions, and other like applications, shall be made and presented on the first day of the term, or at the opening of the court on the morning of each Monday during the term ; and in those counties in which the court is not usually in session more than two weeks, all such motions and other applications shall be made on the first day of the term, or at the opening of the court on the morning of each day ; provided that when the cause or ground of such motion or other application shall first exist or become known to the party, after the times in this rule appointed for making the same, it may be made (if the case require it) at any intermediate time.

22. *Same subject.* When a motion is made in relation to any civil action, at any of the times specifically appointed for that purpose in the preceding rule, no previous notice of the motion need be given to the adverse party ; and if notice is not given, the court will allow him time to oppose the motion, if the case shall require it. But when such motion is made, at any intermediate time, according to the proviso in the preceding rule, the motion shall not be heard, unless seasonable notice thereof shall have been given to the adverse party.

23. *Of the law docket.* When the court is held by three or more of the judges, for the hearing and determining of questions and issues of law, as provided by the statute, all actions intended for argument shall be entered on a law docket, to be kept for that purpose by the clerk ; and if it is a new action of that term, it shall be entered on the law docket at the same time when, by the foregoing rules, it is to be entered on the general docket ; and if a continued action, it shall be entered on the law docket, before the opening of the court, on the first day of the term. And no action shall be entered on the law docket after the times above appointed, unless it shall appear to the court that the entry was prevented by inevitable accident, or other sufficient cause.

24. *Of copies of cases for argument.* In every case intended for argument as aforesaid, copies of all the material papers shall be delivered to each of the judges at, or before the opening of the court on the first day of the term, or immediately upon the entry of the action on the law docket; and no action shall be so entered by the clerk, until the papers are prepared and ready to be delivered as aforesaid; provided that when the question arises upon special pleadings, a special verdict, a writ of error, or *certiorari*, it shall be sufficient to make out one complete copy of the material papers to be delivered to the Chief Justice, and abstracts of the same, to be delivered to each of the other judges; such abstracts to be so made as to present fully the question intended to be argued; and when the question arises upon the answers of a trustee, one copy of the answers shall be deemed sufficient; unless when additional copies shall be ordered by the court.

25. *Of the order of actions on the law docket.* The clerk shall enter on the law docket all actions, in which it shall appear from the record, or from his docket, that there is any question of law to be argued; and all such as either party shall request to have so entered, provided the papers are prepared as above directed: and actions so entered within the times above limited in that behalf, shall be entered in the order in which they stand on the general docket; and if any are entered afterwards, by leave of the court, they shall be entered successively at the end of the law docket, and shall not be argued until they come on in course, on that docket; but all of them shall have their proper numbers prefixed, as they are numbered on the general docket.

26. *Of the party, whose duty it is to furnish the papers in causes for the whole court.* In all cases of writs of error, or *certiorari*, issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, it shall be the duty of the plaintiff or complainant, to cause the action to be entered on the law docket, and to furnish the papers for the court; and in all other cases, the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued; but this shall not prevent the adverse party from making the entry and furnishing the papers, if neglected by him whose duty it is, as aforesaid. And when the party, whose duty it is, shall neglect to enter the action or to furnish the papers as aforesaid, he shall not have any costs for that term.

27. *Of copies required in such causes.* When the papers, of which copies are required as aforesaid, are filed in the clerk's office, it shall be his duty without delay, to make out such copies for the court; unless he shall be notified by the party whose duty it is to furnish the papers that the question of law is waived, or will not be argued: and when an abstract is sufficient, the attorney of the party shall make out the abstract to be copied by the clerk, or otherwise the clerk may make out a complete copy for each judge, the extraordinary expense of which shall be borne by such party, and the costs of the copies shall in every case be

advanced by the party whose duty it is to furnish the same, unless they shall be received and paid for by the adverse party. And all such copies shall be written in a fair, legible hand, on one side only of each sheet, and with a convenient margin; and they shall be folded uniformly, like the other files of the clerk, with the names of the parties, and the number of the action indorsed thereon. And the costs of such copies shall be taxed for the party prevailing in the suit, if he shall have furnished the same.

28. *Same subject.* In cases submitted upon facts stated by the parties, or others in which the papers may not have been filed with the clerk, they may be copied by the party, whose duty it is to furnish the same as above directed; but they shall be written and prepared in the manner above prescribed, or they will not be received by the court.

29. *Of the order in which actions on the law docket are to be argued.* Each civil action shall stand for argument in its order upon the law docket; and when called for argument, if neither party appear, it shall be struck off the law docket, and shall be considered as not having been entered thereon; and if one party only appears, he shall be heard *ex parte*, or the court will render judgment, on nonsuit or default, or such other judgment, as the case may require; but this rule shall not apply to libels for divorce, nor to appeals from the probate court, in which there may be any question or issue of fact.

30. *Of the time within which copies of cases for the whole court are to be delivered.* To enable the court the better to understand the questions to be argued in each case, and to prevent unnecessary delay in the determination thereof, the clerks are required, in all cases, to transmit to the judges in vacation, copies of all papers made by them as aforesaid, as soon as may be after the copies are made out; and the parties who make out their own copies are required to transmit the same in like manner; and no argument will be heard in any case till one day at least after the papers shall have been delivered to the judges, unless it be the first day of the term, or unless the court shall think proper, for special reasons, to dispense with this part of the rule.

31. *Papers not to be taken from the custody of the clerk.* The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, or taken from his custody, unless by special order of court, but the parties may at all times have copies. Provided only, that depositions may be withdrawn by the party producing them, at the same term at which they are opened; and whilst remaining on the files, they shall be open to the inspection of either party, at all seasonable hours.

32. *Of the day on which judgment shall be entered.* The clerk shall make a memorandum on his docket, of the day on which any judgment is awarded, and if no special award of judgment is made, it shall be entered as of the last day of the term.

33. *Of filing papers with the clerk, before judgment recorded.* In order

to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit, forthwith to file with the clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded, unless upon a petition to the court at a subsequent term, and after notice to the adverse party, the court shall order it to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the clerk shall enter the same, together with the order of the court, for recording it among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment, when so recorded, shall be and be considered in all respects, as a judgment of the term in which it was originally awarded. And the party delinquent in such case, shall pay to the clerk the costs of recording the judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

34. *Same subject.* Whereas the clerks in keeping their records in books, according to the ancient usage in this state, do sometimes begin to enter a judgment before they have all the papers necessary to complete the same, and thereupon leave a blank in the book to be afterwards filled up; it is ordered, that no such blanks be suffered to remain for more than six months after the end of the term, at which the judgment was rendered; and if the clerk, after beginning to enter a judgment as aforesaid, shall be prevented from completing the record for want of any necessary papers, as mentioned in the preceding rule, he shall make a memorandum of that fact, as above directed in the blank space so left in the book, so that no one can afterwards interpolate the judgment therein.

35. *Clerks to exhibit their records.* Whereas it is made the duty of the judges of the several courts to inspect the conduct of their respective clerks with regard to the making and keeping of their records, it is therefore ordered, that the respective clerks of this court shall, on the first day of every term, exhibit to the court the then latest book of records in their respective offices, and such others as the court shall require; to the end that in case of any deficiency therein, the court may take the measures prescribed by the statute in such case, and such other measures as the case shall appear to them to require.

36. *Of payment of fees to the clerks.* No cause shall be opened for trial, by the jury, until the fees due in that behalf are paid to the clerk; all other fees due to the clerk shall be paid as soon as they are by law payable, and if the clerk shall fail to demand and receive any such fees

when payable as aforesaid, he shall be chargeable with all those, for which he is by law required to account to others, in like manner, as if he had actually received the same.

37. *Clerks to issue writs of capias and scire facias, ex officio, in certain cases.* On indictments found by the grand jury, the clerk shall, *ex officio*, issue a *capias* without delay; and when default is made by any party bound by recognizance in any criminal proceeding, the clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the court shall make a special order to the contrary.

38. *Writs of venire facias, when to be made returnable.* Every *venire facias* shall be made returnable into the clerk's office by ten of the clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time; excepting only, when in case of a deficiency of jurors, the court shall order an additional *venire facias* in term time, in which case the same shall be made returnable forthwith, or at such time as the court shall order.

39. *Clerks of Common Pleas to record judgments at large.* The respective clerks of the several Courts of Common Pleas, of the several Circuit Courts of Common Pleas, and of the Boston Court of Common Pleas, in all cases in which judgment shall be rendered in those courts respectively, shall record at large the declaration or complaint, and all the pleadings of the parties, with all orders of the courts, and other proceedings in the cause.

40. *Of taxing costs.* Bills of costs shall be taxed by the clerk, upon a bill to be made out by the party entitled to them, if he shall present such bill, and otherwise upon a view of the proceedings and files appearing in the clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the clerk in writing, or by causing it to be entered on the clerk's docket, of his desire to be present at the taxation thereof. And either party dissatisfied with the taxation by the clerk, may appeal to the court, or to a judge in vacation.

41. *Of costs to be taxed for attendance in certain cases.* When an action is continued by the court for advisement, or under reference by a rule of court, costs shall be allowed to the party prevailing, for only one day's attendance and his travel, at every intermediate term.

42. *Of filing the assignment of errors.* In every writ of error, the plaintiff may file the assignment of errors in the clerk's office before taking out the *scire facias*, in which case the same shall be inserted in the *scire facias*, and the defendant shall be held to plead thereto within the first two days of the return term, unless the court shall by special order enlarge the time.

43. *Written arguments, time of delivery to opposite party, answering, &c.* Ordered, that hereafter, if the counsel in any case on the law docket shall choose to present to the court a written argument, he shall deliver a copy thereof, with a citation of all the authorities referred to, unto the adverse counsel, *thirty days* before the beginning of the term

at which the cause is to be argued ; and in such case there shall be no additional argument, on the same side, except in reply as hereafter stated ; and if the counsel who shall receive such copy shall determine to answer the case in writing, he shall deliver a copy of his answer, with his citation of authorities, to the counsel from whom he received the argument, *seven days* before the said term ; and in such case, both of the arguments, with the reply by the opening counsel, if any be made, shall be delivered to the court at the beginning of the term, and shall not be read by the counsel ; but the counsel who may receive such written argument may answer the same *ore tenus*, at such time as shall be assigned by the court, after having had opportunity to read the same ; and in such case only, the adverse counsel may reply *ore tenus*, but shall be held strictly to a reply to the answer to his written argument, without recurrence thereto, except for the purpose of replying as aforesaid. Provided, however, in the case of sickness or necessary absence of counsel, the court may, at their discretion, receive a written argument, or may hear the same read, in which case the adverse counsel may, if he require it, have time to answer the same.

44. *Papers of the case, delivery of them to a party.* Ordered, that the clerks, in term time, deliver to the counsel or attorney of any party to a suit actually pending, when requested, the papers belonging to the case, on being furnished with the receipt of such counsel or attorney, and a written undertaking to return the same before the adjournment of the court, or sooner if required.

45. *Delivery of plea, &c. to the opposite party.* Whenever any amendment, declaration, plea, answer, or other proceeding, shall be filed in vacation by the counsel or attorney of a party, the clerks shall, when requested, deliver the same to the counsel or attorney of the adverse party, upon being furnished with the receipt of such counsel or attorney, and a written undertaking to return the same by the first day of the next term, or sooner if required.

46. *General counts, manner of recording.* Whenever there are several common or money counts in the declaration of an action, in which judgment shall have been rendered, the clerks, in making up the record, shall not record the same at large, but shall condense the same into one count.

47. *Appeals from the municipal court.* Ordered, that hereafter all appeals from the Municipal Court to this court, shall be entered on the first day of the term to which the said appeal is claimed, and all papers necessary to be produced shall be filed on said first day. And it shall be the duty of the clerk or clerks of this court, to keep a separate list or docket of such appeals, and to deliver a copy of the same to the attorney or solicitor general, at the opening of the court, on the second day of the term. And said appeals shall stand first for trial by jury at that term ; and if at the opening of the court, on the second day aforesaid, (before which day the clerk of the Municipal Court shall file all the re-

cognizances taken at the preceding term of the Municipal Court on appeal,) this rule shall not have been complied with, the said appellants or their sureties shall, on motion of the attorney or solicitor general, be defaulted, and *scire facias* shall be awarded against them as the law provides.

48. *Motions for new trial.* Hereafter no motion shall be sustained for a new trial in any civil action, after verdict of the jury, either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence or the weight of evidence, unless, within *three days* after the verdict is returned, the counsel of the party complaining of the proceedings or the verdict, shall file a motion for a new trial, specifying the grounds of his complaint, and causing a copy of the said motion to be delivered to the adverse counsel on the day the same shall be filed. And if it shall be alleged as the ground or one of the grounds of the motion, that the verdict is against the evidence, or the weight of it, the counsel of the party shall, within *ten days* after the filing of his motion, make out and deliver to the clerk a copy of his minutes of the evidence, if oral, and shall specify the depositions or documents on which he intends to rely in support of his motion; otherwise the motion shall be stricken off, and judgment may be rendered on the verdict, on the motion of the counsel for the party, in whose favor the verdict shall be returned.

Provided, however, that this rule shall not apply to cases in which the judge presiding at the trial shall, of his own mere motion, reserve any question of law; nor shall it affect the right of parties to file exceptions according to the statute in that case made and provided.

And provided, also, that should the trial of any case be had so near the close of any term, that the foregoing rule cannot be complied with, motion for new trial shall be made before the court adjourns, and the specifications of the reasons shall be filed within *three days* afterward, and that such time shall be allowed for compliance with the residue of this rule, as the presiding judge shall order.

49. *Writ of protection.* Whereas it has been the practice of parties to any suit pending in this court, and also of persons showing that they have been summoned as witnesses in any suit pending in this court, to apply for and take out writs of protection, which writs issued as of course, which practice may be attended with abuses:

Ordered, that from and after the first day of September next, no writ of protection shall issue except by the order of court, or some one of the judges thereof, such order to be made upon the application of the person for whom such writ of protection is to be issued, or of some person by him duly authorized; and no order will be made for granting such writ of protection, until it shall be made to appear to the court or judge applied to, by affidavit or other satisfactory evidence, that the application is made in good faith, and for the purpose of enabling such person to attend this court, as a party or witness in some cause pending,

such cause to be specified:—if a party, that such suit has not been commenced by him collusively (or, if a defendant, that such suit has not been commenced against him by his request or procurement collusively,) and to enable him to obtain a writ of protection; or if a witness, that he has been duly summoned by process to attend as a witness, and that he has not been so summoned by his own request or procurement, or collusively, to enable him to obtain the writ of protection applied for.

RULES OF THE SUPREME COURT FOR THE COUNTY OF SUFFOLK, ESTABLISHED AT THE MARCH TERM, 1827.

Whereas the great number of actions usually found on the docket of this court for the county of-Suffolk, and the long continuance of the terms for jury trials, seem to require some regulations which are not necessary and might not be useful in other counties:—It is ordered by the court, that the following rules and regulations be adopted and hereafter practised upon and enforced by the justices of this court respectively, who shall hold the terms for the trial of civil actions by jury.

1. *Trial list of continued actions.* On the first day of the November term, and on some convenient day of the March term, previous to the sittings for jury trials, the docket of continued actions shall be called over, and all actions intended for trial shall be noted as such, at the suggestion of the counsel for either party; and no action which shall not be so noted for trial shall be entitled to a trial during that term, unless satisfactory cause shall be shewn for the delay: and in regard to actions not on the trial list, unless it appear by entry on the docket that they are not in a state for trial, they shall be nonsuited or defaulted on the motion of the counsel respectively, or shall be dismissed by the court without costs to either party, on the day next succeeding the making out of the trial list as aforesaid.

2. *Of new entries.* On such day as shall be appointed by the presiding judge, he giving notice from the bench one day, at least, previous thereto, the same proceedings shall be had in regard to the list of new entries, as are provided for by the foregoing rule in regard to continued actions.

3. *Postponement, substitution, and continuance of actions.* As it frequently happens that there is just cause for postponement of actions on account of evidence expected from abroad, when there may not be sufficient reason for a continuance thereof to the next term, and by reason of such postponement the order of the docket is deranged, to the inconvenience of parties or counsel who might otherwise be prepared for trial:—It is ordered, that immediately after the making out of the trial list as aforesaid, the court will proceed to hear and deter-

mine motions for postponement, which shall be sustained only upon affidavit, as in case of motions for continuance, unless the ground of the motion shall appear on the docket; and all continued actions, which shall be postponed, shall be placed in their order at the end of the continued list, and shall stand for trial in that order, subject to be further postponed, if in the opinion of the court a sufficient cause shall continue to exist. But no action shall be postponed by consent, except by way of substitution as heretofore provided. And no motion shall be sustained for postponement, after the hearing upon such motions shall have been gone through with as aforesaid, for any cause which was known to exist at the time when such motion ought to have been made. And if any new cause arise, the motion shall be made on the day next after the fact, on which it may be founded, shall have come to the knowledge of the party.

4. *Commissions to take depositions abroad.* Whereas delay sometimes occurs by reason of omission or neglect to take out commissions for evidence from other states or foreign countries:— It is ordered, that no action shall be postponed or continued to await the return of such commissions, if it shall appear that there has been any negligence to apply for and transmit the same, whether such negligence happen in term time or in vacation.

5. *Auditors.* Whenever auditors shall be appointed in any action, the rule shall be taken out and proceeded upon within such time during the term, or in the vacation, as that the report shall be made at the next succeeding term of the court; and if no report shall be made within three weeks from the commencement of said next term, the rule shall be discharged, and the action shall stand for trial, subject to the foregoing rules, unless the court shall, in its discretion, allow further time for the auditors to proceed.

B.

RULES OF THE COURT OF COMMON PLEAS.

1. *Admission of attorneys.* Any person may be admitted an attorney of this court, who shall have had a liberal education, and regular degree, at some public college, and afterwards have commenced and pursued the study of the law, in the office and under the instruction of some counsellor at law, for three years, having first been recommended by the bar of the county, where he last studied, as having a good moral character, and as suitably qualified for such admission.

2. *Same subject.* Any person not having had a liberal education and a regular degree, as aforesaid, who shall have commenced and pursued the study of the law, in the office of some counsellor at law for the

term of five years, and recommended as aforesaid, shall be considered as qualified for admission.

3. *Same subject.* Any person having had a liberal education and a regular degree, as aforesaid, who shall afterwards have commenced and pursued the study of the law, in any other state, in the office of an attorney of the highest judicial court of such state, for one year, and afterwards shall pursue the study of the law, in the office of some counsellor at law, in this state, for the term of two years, and being recommended, as aforesaid, may be admitted.

4. *Same subject.* Any person not having had a liberal education and a regular degree, as aforesaid, who shall have commenced and pursued the study of the law, in any other state, in the office of an attorney of the highest judicial court of such state, for the term of *two years*, and shall afterwards have pursued the study of the law, with some counsellor at law of this state, for the term of three years, and being recommended, as aforesaid, shall be considered as qualified for admission.

5. *Same subject.* Any person who shall have been regularly admitted in a Court of Common Pleas, or any higher court, in another state, and being recommended, as aforesaid, shall be entitled to admission.

6. *Same subject.* If the bar of any county shall unreasonably refuse to recommend to this court any person qualified for admission, as an attorney, such person submitting to an examination by the court, and producing sufficient evidence of his good moral character, may be admitted an attorney of this court.

7. *Leave to plead double.* Leave to plead double will be granted of course, on application to the clerk, and entered on his docket, at any time within the first *four days* of the return term; and by special leave of court may be entered after.

8. *Rule to plead.* Either party may obtain a rule on the other to plead, reply, rejoin, &c. within a given time, to be prescribed by the court, and if the party, so required, neglect to file his pleadings, at the time prescribed, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court, for good cause shewn, shall enlarge the rule.

9. *Time of filing amendments.* When an action shall be continued, with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c. if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office, by the middle of the vacation, after the term when the order is made; and, in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c. as the case may be, by the first day of the term to which the action is continued, as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shewn, shall allow further time for filing such amendment, or other pleadings.

10. *Amendments of form.* Amendments in matters of form will be allowed, as of course, on motion ; but if the defect or want of form be shewn as cause of demurrer, the court may, in their discretion, impose terms on the party amending.

11. *Amendments of substance.* Amendments, in matters of substance, may be made in the discretion of the court, on payment of costs, or on such other terms as the court shall impose ; but, if applied for after joinder of an issue of fact or law, the court will, in their discretion, refuse the application, or grant it upon special terms ; and, when either party amends, the other party shall be entitled also to amend, if his case requires it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration and for the same cause of action.

12. *Disposition of depositions.* All depositions shall be opened and filed with the clerk, at the term for which they are taken, and if the action, in which they are to be used, shall be continued, such depositions shall remain on the files and be open to all objections, when offered on trial, as at the term at which they were opened ; and, if not so left in the files, they shall not be used by the party who originally produced them ; but the party producing a deposition may, if he see fit, withdraw it during the same term, in which it is originally filed ; in which case it shall not be used by either party.

13. *Commissions to take depositions.* The court will grant commissions to take the depositions of witnesses, without the state, and will appoint the commissioners ; and either party may, on application to the clerk, in vacation, obtain a like commission ; which commission, in the latter case, shall be directed to any justice of the peace, notary public, or other officer legally empowered to take depositions, or affidavits, in the state or country, where the deposition is to be taken, unless the parties shall agree on commissioners. And in each case the deposition shall be taken upon interrogatories, to be filed, by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party ; the whole of which interrogatories, shall be annexed to the commission. And the party applying for the commission, shall, in each case, file his interrogatories, in the clerk's office, and give notice thereof to the adverse party or to his attorney, *seven days*, at least, before taking out the commission, and *one day* more for every *ten miles* that such party or his attorney shall live from the clerk's office. And no deposition, taken without the state, by force of the statute, in such case provided, and without such commission, shall be admitted in evidence, unless it shall appear that the adverse party or his attorney had sufficient notice of the taking thereof, and opportunity to cross-examine the witnesses, or that, from the circumstances of the case, it was impossible to give such notice. And when a deposition shall be taken and certified by any person as justice of the peace, or other officer, as aforesaid, by force of such commission, if it shall be objected that the person so tak-

ing and certifying the same was not such officer, the burthen of proof shall be on the party so objecting; and if a like objection is made to a deposition, taken without such commission, it shall be incumbent on the party producing the deposition, to prove that it was taken and certified by a person duly authorized, according to the statute before mentioned.

14. *Depositions taken in term time.* Depositions may be taken for the causes and in the manner by the law prescribed, in term time, as well as in vacation; provided, they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. But neither party shall be required, during term time, to attend the taking of a deposition, at any other time and place, than is above provided, unless the court, upon good cause shewn, shall specially order the deposition to be taken.

15. *Affidavits for continuance.* No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavor and means which have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose.

And no counter affidavit shall be admitted, to contradict the statement of what the absent witness is expected to prove: but any of the other facts stated in such affidavit, may be disproved by the party objecting to the continuance. And no action shall be continued on such motion, if the adverse party will admit, that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence on the trial, in like manner, as if the witness were present, and had testified thereto; and such agreement shall be made in writing, at the foot of the affidavit, and signed by the party or his counsel or attorney. And the same rule shall apply, *mutatis mutandis*, where the motion is grounded on the want of any material document, paper, or other evidence, which might be used on trial.

16. *Laches in summoning witnesses.* No action shall be continued on the ground of the absence of a material witness, whom it is in the power of the party to summon; unless such witness be regularly summoned, and his travel and one day's attendance paid or tendered.

17. *Continuance on terms.* When an action is continued, at the motion of either party, at the time when it might otherwise have been tried, the party making the motion shall pay to the adverse party all his costs incurred, at that term, in procuring the attendance of witnesses; unless the continuance is ordered on account of some unfair advantage taken by the adverse party, or some other fault or misconduct on his part; or unless, when the party making the motion, shall have given notice thereof, with a statement of the grounds of such motion to the adverse

party, or his attorney, in such season, before the sitting of the court, as might have prevented the attendance of the witnesses, or when it shall appear that the ground of the motion was not seasonably known to the party making it. And the costs thus paid shall not be included in the bill of costs of the party receiving them, if he should finally prevail in the suit.

18. *Same subject.* The preceding rule will not prevent the court from imposing any other additional terms, on the party moving for a continuance, when the justice of the case shall require it, neither shall it be construed to prevent the party, to whom such previous notice may have been given, from procuring the attendance of his witnesses, if he shall think fit to oppose the motion for a continuance. And in such case, if the motion is granted, the costs for such witnesses, shall be allowed in the bill of costs for the said party, if he should finally prevail in the suit.

19. *Motions grounded on facts.* The court will not hear any motion grounded on facts, unless they are agreed by the parties or their attorneys, or are verified by affidavit, or are apparent from the record, or from the papers on file in the case, and the same rule will be applied as to all facts relied on, in opposing any motion.

20. *Bringing money into court.* In all cases in which money may be brought into court, upon the common rule, if the plaintiff shall not accept the same, and if on trial, the verdict shall be for the defendant, the plaintiff shall not be liable for any cost, incurred before the time of bringing the money into court, but only for the costs incurred after that time.

21. *Attornies not to be bail.* No counsellor or attorney of this court, shall on pain of being struck from the roll, be bail in any cause pending in this court.

22. *Oyer.* Oyer of all deeds, &c. declared on, may be had on motion at the return term, but not afterwards, unless by special order of court.

23. *Issue in fact and in law.* If in the same cause there be an issue in fact, and an issue in law, the issue in law shall be first argued and determined, unless the court, for good cause, otherwise direct.

24. *Motions in arrest.* Motions in arrest of judgment, or for new trial shall be made in writing, and the causes thereof shall be specified therein.

25. *Signatures not to be denied, &c.* No attorney shall be permitted to deny the signature of any paper declared on, unless he shall satisfy the court that he has been instructed by his client so to do, or that he verily believes such signature not to be genuine, or unless he shall have given the adverse party seasonable notice.

26. *Jury fees.* When a cause is opened to the jury by reading the writ, and the jury fees remain unpaid, the court will consider the counsel for the plaintiff or appellant responsible for such fees; unless

the court upon a subsequent nonsuit or default, should see fit to remit them.

27. *Right of appearance.* The right of an attorney to appear for any party, in this court, shall not be questioned, by the opposite party, unless the exception be taken at the first term. And when the authority of an attorney, to appear for any party, shall be demanded, if such attorney shall declare that he has been duly authorized to appear, by application made directly to him, by such party, or by some person, whom he believes has been authorized to employ him, it shall be deemed and taken to be evidence of an authority to appear and prosecute or defend, in any action or petition.

28. *Right of opening and closing.* The party holding the affirmative shall open and close. When there is a plea of general issue, and also a special plea, and the general issue is not waived, the plaintiff shall open and close. When at the commencement of the trial, the defendant shall waive the general issue, and shall not require the plaintiff to prove the same, on his part, the defendant shall open and close. In the argument of all questions, arising upon the answers of trustees, the plaintiff shall open and close.

When, in an action of trespass *quare clausum fregit*, the defendant pleads soil and freehold, without the general issue, the defendant shall open and close. When, in an action of replevin, the defendant pleads property in himself or in a stranger, the plaintiff shall open and close.

29. *Trustees' answers.* Before the answers of a trustee are handed to the court, there shall be minuted upon the back, the names of the counsel for the plaintiff, and trustee. And, when either party wishes to be heard, before the decision of the court, there shall also be minuted the words "for argument."

30. *Officers' extra compensation.* When any officer claims extra compensation in serving a precept, for removing or keeping property, the same shall not be allowed, unless the officer return with his precept a bill of particulars of the expenses, together with his affidavit, that such expenses were actually incurred, and that the charges are reasonable.

31. *Filing money counts, &c.* In actions of assumpsit for goods sold and delivered, services performed, &c. the plaintiff may declare in *indebitatus assumpsit*, and on motion may, without costs or continuance, at any time before the cause is committed to the jury, file any of the common counts, applicable to the case, including also the money counts, and *insimul computassent*.

32. *Entering verdict on particular count, &c.* If there be a general verdict on a declaration, containing several counts, the plaintiff may, at any time, during the term, on motion, have leave to amend the verdict, and enter it on any count, on which the evidence by law would, at the trial, have entitled him to recover, and may have leave to strike out of his declaration, any defective counts.

33. *Party not held to trial first term without notice.* In the counties of

Berkshire, Franklin, Hampshire, Hampden, Worcester, Middlesex, Essex, Norfolk, Bristol and Plymouth, a party shall not be holden to be ready for trial, the first term, unless the adverse party has given notice in writing, *seven days* before the sitting of the court, that he shall expect a trial, at such term. In cases of appeal from justices of the peace, when the justice shall allow the appeal, within *seven days* before the sitting of the court, such written notice, given at the time of the allowance of the appeal, or as soon after as practicable, shall be deemed sufficient notice: Provided, that this rule shall not be construed to prevent the court from granting a continuance, when it shall appear that the party notified could not be prepared for trial.

34. *Motions respecting awards.* All objections to the acceptance of an award, and all motions to have the same recommitted, shall be reduced to writing, and the grounds of such objection or motion distinctly stated, and if the objections and motions are grounded upon facts, those facts shall be verified in the manner provided in the nineteenth rule.

35. *Former rules continued.* The third, fourth, fifth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth rules of the Boston Court of Common Pleas, adopted at the July term, 1820, shall continue to be in force in the county of Suffolk.*

* The following are the rules here referred to: — viz.

3. A list of all actions intended for entry, shall be delivered to the clerk on or before the evening of Thursday, of the first week of each term, and shall be entered by him, and the new docket prepared for the examination of the gentlemen of the bar, and for entering of appearances, by nine o'clock in the forenoon of Saturday of the same week; and no list of entries shall be received by the clerk after the evening aforesaid, nor any action be entered excepting by order of court, after the time aforesaid; and in all cases, in which actions shall be entered by order of court, after the time aforesaid, no attendance shall be taxed for the plaintiff previously to the time of entering such action; and if the defendant shall be defaulted, the first term, in any action so entered, no appearance having been entered for him, no attendance shall be allowed to the plaintiff.

4. On the first day of each term, the continued docket shall be called, and a list of all actions intended for trial shall be made, and in all cases, which shall be set down for trial, the counsel for the plaintiffs, on or before Saturday, of the first week of the term, shall deliver to the court, a short memorandum of the nature of each action, and generally how it arises, and what sum is demanded in damages, and the counsel for the defendants shall deliver as aforesaid a short memorandum of the grounds of their defences: And in all actions which shall be set down for trial, on the new docket, like memoranda shall be delivered to the court, within *seven days* from the time of calling the new docket, to the end that the court may see whether or not it has final jurisdiction of the causes to be tried, and, to a certain extent, what number of causes it may be useful to assign for trial, on each day. — And in all cases the party omitting to deliver to the court such memorandum within the term

36. *Filing pleas in abatement and demurrer.* Pleas in abatement and demurrers to declarations may be filed, at any time, during the first four days of the return term, and not afterwards.

37. *Party not to be compelled to take judgment the first term.* In those counties mentioned in rule thirty-three, of the rules passed July term,

aforesaid, will be considered as waiving his right to a trial, though he may be compelled to submit to one.

On Tuesday of the second week, in each term, the new docket will be called, and a list of all actions intended for trial will be made.

5. In the memorandum required to be delivered by rule fourth, it will not be expected that the plaintiff will state in what manner he shall support his action, nor the defendant how he shall make out his defence. In a writ of entry it will be sufficient for the demandant to state the degree and shew the alienations or descents; in an action of debt, for the plaintiff to say debt on judgment, on bond, on statute, &c. &c. in assumpsit, to say on promissory note, for goods sold or services rendered, &c. &c. in case, for torts, to say for slander, malicious prosecutions, trover, &c. &c. in trespass, to say for taking goods, *quare clausum fregit*, assault and battery, &c. &c. in replevin, to say for goods, of the value of. And for tenant in a writ of entry, it will be sufficient to say, never disseized, or state what he proposes to plead specially; in debt, to say no such record, not his deed, he owes nothing, &c. &c.; in assumpsit, to say he never promised, and relies on proving payment, usury, infancy, statute of limitations, set off, &c. &c.; in trespass and case, to say not guilty, special justification, &c. &c.; and in replevin, to say *non cepit*, or property in himself, or a stranger, &c.

14. All judgments and continuances shall be entered as of the last day of the term, unless where otherwise especially ordered by the court.

15. Every person summoned as a trustee, living within the county, when he enters his appearance, in the action in which he is so summoned, shall give notice thereof, to the counsel of the plaintiff, personally, or by leaving a notification at his office, if he keeps one within the county, advising him that he has entered his appearance in the action in which he is so summoned, and will be ready to answer such interrogatories, as may be proposed to him, on some certain day, not exceeding three days, from the time of such notice. And the declaration of any supposed trustee, inserted in his answer and sworn to, shall be sufficient to prove such notice.

16. Any person summoned as a trustee, shall not be entitled to any fees for attendance, until after he has appeared and given notice as aforesaid. And every person summoned as aforesaid, shall be entitled to fees for attendance, from the time of his appearance and giving notice as aforesaid, until he is discharged, excepting fees for attendance during the time, the cause may be continued, by order of court, for advisement.

17. If the trustee unreasonably neglect to answer interrogatories, the court, upon motion of the plaintiff, will assign a day by which his answers shall be filed, or the trustee defaulted.

18. If the plaintiff shall discontinue his action against the trustee, on or before the second day of the term, such trustee shall be entitled to costs of his travel and three days attendance only.

eighteen hundred and twenty-three, at the first term, in all causes, except those in which notice has been given that a trial will be insisted upon, if there is an appearance for the defendant, a continuance will be granted of course ; and one party shall not compel the other to submit to have the action carried to the Supreme Judicial Court, by offering him judgment. But at the first term, when notice of trial has been given, and in all causes, after the first term, one party may compel the other to go to the Supreme Judicial Court, by offering him judgment, except in extraordinary cases, in which, for good reasons, the court may otherwise order.

38. *Actions not to be entered until the writ is filed, except in Suffolk.* The clerks of this court, in the several counties, except the county of Suffolk, shall not enter any action upon the docket before the writ is returned and placed upon file, except in extraordinary cases, in which the court may otherwise order.

39. *Recording judgment.* In order to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit, forthwith to file with the clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case ; and if the same are not so filed within *six months* after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record ; and the judgment shall not be afterward recorded, unless upon a petition to the court at a subsequent term, and after notice to the adverse party, the court shall order it to be recorded. And no execution shall issue, until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the clerk shall enter the same, together with the order of the court, for recording it among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found ; and the judgment, when so recorded, shall be, and be considered in all respects as a judgment of the term in which it was originally awarded. And the party delinquent in such case, shall pay to the clerk the costs of recording the judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

40. *No blanks to be left in the record.* Whereas the clerks in keeping their records in books, according to the ancient usage in this state, do sometimes begin to enter a judgment before they have all the papers necessary to complete the same, and thereupon leave a blank in the book to be afterward filled up ; it is ordered, that no such blanks be suffered to remain for more than one year after the end of the term at which the judgment was rendered ; and if the clerk, after beginning to enter a judgment as aforesaid, shall be prevented from completing the record for want of any necessary papers, as mentioned in the preceding

rule, he shall make a memorandum of that fact, as above directed, in the blank space so left in the book, so that no one can afterward interpolate the judgment therein.

C.

CALENDAR OF THE SUPREME JUDICIAL COURTS.

LAW TERMS.

Suffolk and Nantucket. Boston, 1st Tuesday in March.

Essex. Salem, on the 6th Tuesday next after the 4th Tuesday in September.

Middlesex. Cambridge, on the 3d Tuesday next after the 4th Tuesday in September.

Bristol, Plymouth, Barnstable and Dukes County. Plymouth and Taunton, alternately on the 4th Tuesday next after the 4th Tuesday of September.

Worcester. Worcester, on the 1st Tuesday next after the 4th Tuesday in September.

Berkshire. Lenox, on the 2d Tuesday in September.

Norfolk. Dedham, on the 5th Tuesday next after the 4th Tuesday of September.

Hampshire, Hampden, and Franklin. Northampton, on the Monday next preceding the 4th Tuesday in September.

NISI PRIUS TERMS.

Suffolk. Boston, 7th Tuesday next after the 4th Tuesday in September.

Nantucket. At Nantucket, for the county of Nantucket, on the 1st Tuesday of July.

Essex. At Ipswich, for Essex county, on the 8th Tuesday next after the 1st Tuesday in March.

Worcester. At Worcester, for Worcester county, 6th Tuesday next after the 1st Tuesday in March.

Middlesex. At Concord, on the 2d Tuesday in April.

Norfolk. At Dedham, on the 3d Tuesday in February.

Berkshire. At Lenox, for Berkshire county, on the 10th Tuesday next after the 1st Tuesday in March.

Plymouth. At Plymouth, for Plymouth county, on the 10th Tuesday next after the 1st Tuesday in March.

Hampshire. At Northampton, on the 7th Tuesday next after the 1st Tuesday in March.

Hampden. At Springfield, for Hampden county, on the 8th Tuesday

next after the 1st Tuesday in March, and on the 1st Tuesday in September.

Barnstable and Dukes. At Barnstable, for Barnstable and Dukes counties, on the 9th Tuesday next after the 1st Tuesday in March.

Franklin. At Greenfield, for Franklin county, on the 6th Tuesday next after the 1st Tuesday in March, and on the 2d Tuesday of September.

Bristol. At Taunton, for Bristol county, on the 7th Tuesday next after the 1st Tuesday in March, and at New Bedford, on the 2d Tuesday in November.

CALENDAR OF COURTS OF COMMON PLEAS.

Suffolk. Boston, 1st Tuesday in January, April, July, and October.

Essex. Ipswich, on the 3d Monday of March, and 3d Monday of December. Salem, 3d Monday of June. Newburyport, 3d Monday of September.

Middlesex. Concord, 2d Monday in September, 2d Monday in March, and 2d Monday in June. Cambridge, 2d Monday in December.

Hampshire. Northampton, 4th Monday in March, 3d Monday in August, and 3d Monday in November.

Plymouth. Plymouth, 2d Monday in April, 2d Monday in August, and 1st Monday in December.

Bristol. Taunton, on the 2d Monday of March, and September, and at New Bedford, on the 2d Monday of June and December.

Barnstable. Barnstable, on the Tuesday next succeeding the 1st Monday of April, and the 1st Tuesday in September.

Dukes. Edgartown, on the last Monday in May, and the last Monday of September.

Nantucket. Nantucket, 1st Monday in June, and 1st Monday in October.

Worcester. Worcester, 1st Monday in March, 3d Monday in June, Monday next after the 4th Monday in August, and 1st Monday of December annually.

Berkshire. Lenox, 4th Monday of February, June, and October.

Norfolk. Dedham, 4th Monday in April, 3d Monday in September, and 3d Monday in December.

Franklin. Greenfield, on the 3d Monday in March, 2d Monday in August, and 2d Monday in November.

Hampden. Springfield, 3d Monday in June, 2d Monday in October, and 3d Monday in February.

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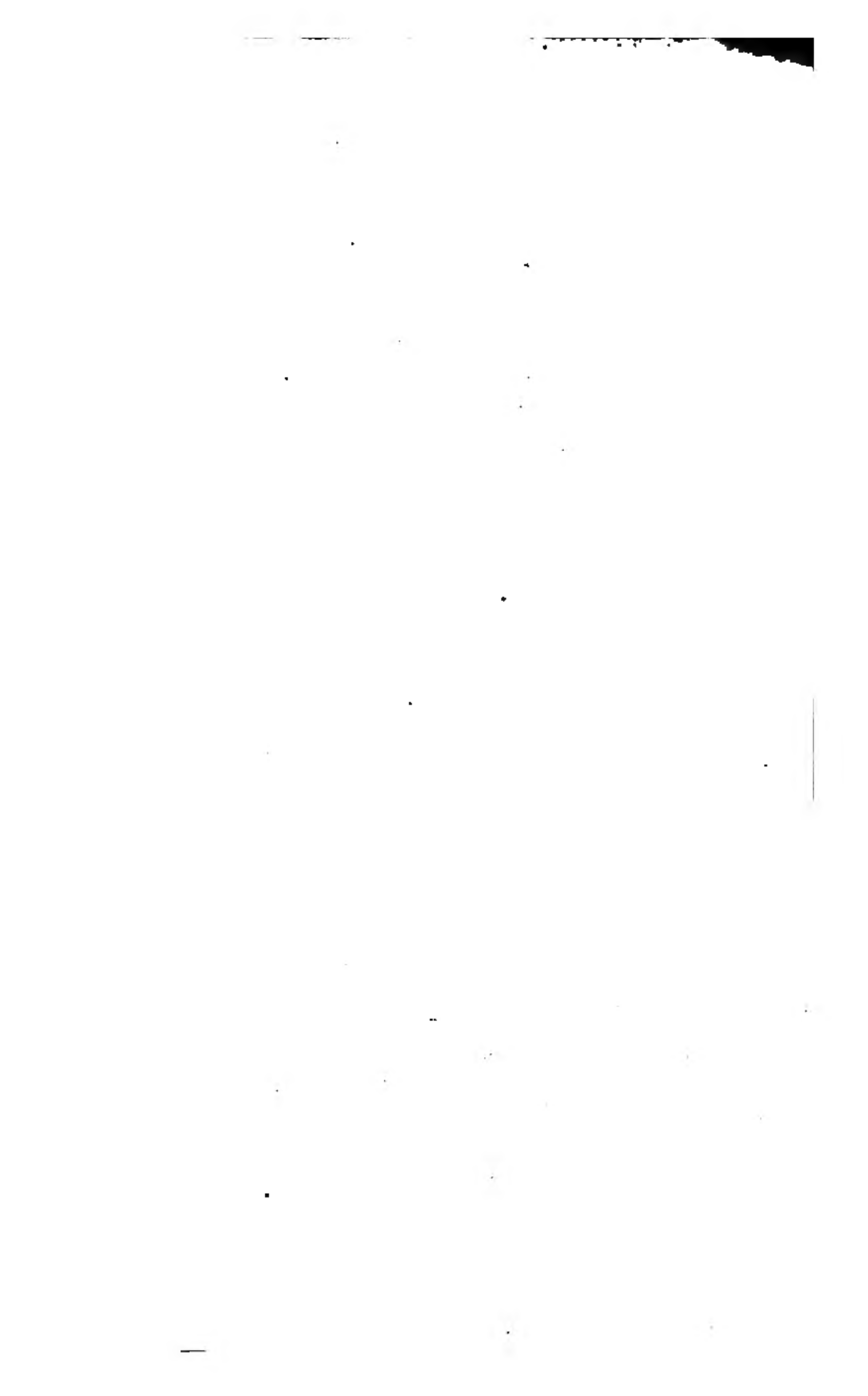
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